

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5888

SPECIAL CALENDAR

327

UNITED STATES EX RELATIONE I. G. FARBEN-
INDUSTRIE AKTIENGESELLSCHAFT, APPEL-
LANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE; OGDEN L. MILLS, SECRETARY OF
THE TREASURY; W. O. WOODS, TREASURER OF
THE UNITED STATES, AND HOWARD SUTHER-
LAND, ALIEN PROPERTY CUSTODIAN.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED JANUARY 20, 1933.

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Court of Appeals of the District of Columbia

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THE UNITED STATES, AND HOWARD SUTHER-
LAND, ALIEN PROPERTY CUSTODIAN, APPEL-
LEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5888.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue, et al.

a Supreme Court of the District of Columbia.

At Law.

No. 81880.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN
L. MILLS, Secretary of the Treasury; W. O. Woods, Treas-
urer of the United States, and Howard Sutherland, Alien
Property Custodian, Respondents.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the Dis-
trict of Columbia, at the City of Washington, in said Dis-
trict, at the times hereinafter mentioned, the following
papers were filed and proceedings had in the above-entitled
cause, to wit:

1 In the Supreme Court of the District of Columbia.

At Law.

No. 81880.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Frankfurt A/M. Germany, Petitioner,
against

DAVID BURNET, Commissioner of Internal Revenue, 12th
Street and Constitution Avenue N. W., Washington,
D. C.; Ogden L. Mills, Secretary of the Treasury, 15th
Street and Pennsylvania Avenue N. W., Washington,
D. C.; W. O. Woods, Treasurer of the United States,
15th Street and Pennsylvania Avenue N. W., Washing-
ton, D. C.; Howard Sutherland, Alien Property Custodian,
Tower Building, Washington, D. C., Respondents.

Petition for Writ of Mandamus.

Filed September 28, 1932.

The petition of I. G. Farbenindustrie Aktiengesellschaft respectfully represents to the Court as follows:

1. The petitioner, I. G. Farbenindustrie Aktiengesellschaft, is a corporation duly organized under the laws of the Republic of Germany with its office and principal place of business located at Frankfurt A/M. Germany. The said petitioner has now duly succeeded to all the rights, titles, and interest of Farbenfabriken vormals Fr. Bayer and Company, a German corporation, for which Carl Duisberg, Rudolph Mann, and Christian Hess held as trustees prior to 1918 all of the stock, except qualifying shares of Bayer Co., an American corporation as more in detail hereinafter set forth.

2 2. The respondent, David Burnet, is Commissioner of Internal Revenue of the United States, and is charged with the duty of authorizing and directing the proper Disbursing officer of the United States Treasury to refund and pay back all internal revenue taxes erroneously or illegally collected, with interest on the principal amount of any such refund paid after June 28, 1928 at the rate of

six (6) per centum per annum from the date the tax was paid to a date not more than thirty (30) days prior to the date of the refund check in accordance with the provisions of the Statute in such cases made and provided.

3. The respondent, Ogden L. Mills, is Secretary of the Treasury of the United States, is the Chief fiscal officer thereof and is charged with the duty, among others, of approving payments from the public funds in accordance with law.

4. The respondent, W. O. Woods, is Treasurer of the United States, and is charged with the duty, among others, of making payments from the public funds as provided by law.

5. The respondent, Howard Sutherland, is Alien Property Custodian of the United States, and is charged with the duty, among others, under Section 23 of the Trading with the Enemy Act, as amended, of paying to the person entitled thereto, from and after March 4, 1923, the net income accruing and collected thereafter in respect of any money or property held in trust for such person by the Alien Property Custodian, or by the Treasurer of the United States for the account of the Alien Property Custodian.

6. The respondents Mills, Woods and Sutherland are hereby made parties hereto to the end that the Court
3 have before it all proper parties having an interest in, relation to, or duty in the premises.

7. Prior to 1918 there existed an American corporation, Bayer Co., all of the stock of which, except qualifying shares, stood in the record names of Carl Duisberg, Christian Hess, and Rudolph Mann, German citizens, who, in truth and in fact held such stock as trustees for the real owner thereof, a German corporation, Farbenfabriken vormals Fr. Bayer & Company. The aforesaid stock was seized by the Alien Property Custodian on January 15, 1918, pursuant to the provisions of the Trading with the Enemy Act, and sold by him on February 4, 1919 for \$5,296,232.36. On or about April 9, 1919, said \$5,296,232.36 was duly deposited in the Treasury of the United States by the Alien Property Custodian as Alien Property Trust No. 6781, there to be held and disposed of as provided by law.

8. On or about March 15, 1924, a Deputy Collector of Internal Revenue prepared and filed individual income tax

returns for the year 1918 for said Carl Duisberg, Christian Hess and Rudolph Mann. In the case of each of the said individuals there was included as taxable income in the returns so filed one-third of the difference between the aggregate par value of the stock in question and the total price at which the same was sold, as aforesaid, by the Alien Property Custodian. Internal revenue taxes in the aggregate amount of \$3,252,268.91 were assessed against said individuals and were paid to the Collector of Internal Revenue at Baltimore, Maryland, on or about March 15, 1924, by the Alien Property Custodian, on behalf of said individuals, from the funds deposited as aforesaid in the Treasury in said Trust No. 6781.

4 9. Thereafter the Alien Property Custodian, on behalf of said Carl Duisberg, Christian Hess and Rudolph Mann and/or the beneficial owner of said Trust No. 6781 duly filed claims for refund of the taxes paid as aforesaid. The said claims for refund were duly allowed in full in May 1929, and the total principal amount of said taxes, to wit, \$3,252,268.91 was refunded and paid to the Alien Property Custodian in May 1929 and by him restored to said Trust No. 6781.

10. When the aforesaid refunds were made in May 1929 the Revenue Act of 1928 was in full force and effect. Section 614 of said Revenue Act provides as follows:

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax, at the rate of six (6) per centum per annum as follows:

(1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921 or any subsequent revenue Act, then to the date of the assessment of that amount.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty (30) days, such date to be determined by the Commissioner.

5 (b) As used in this section the term "additional assessment" means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency of any income or estate tax

imposed by the Revenue Act of 1924 or by any subsequent Revenue Act.

(c) Section 1116 of the Revenue Act of 1926 is repealed.

(d) Subdivisions (a), (b) and (c) shall take effect on the expiration of thirty (30) days after the enactment of this act, and shall be applicable to any credit taken or refund paid after the expiration of such period, even though allowed prior thereto.

11. The said Revenue Act of 1928 was approved May 29, 1928.

12. No interest has been authorized, approved or paid by the respondents, Burnet, Mills or Woods, to the respondent, the Alien Property Custodian on account of said refunds, and the petitioner, therefore, has not received any such interest from the said Alien Property Custodian.

13. The petitioner has duly succeeded to all the rights, titles and interest of the said German corporation, Farbenfabriken vormals Fr. Bayer & Company, which was the beneficial owner of said stock at the time of said seizure, and for which said Carl Duisberg, Christian Hess and Rudolph Mann, theretofore held said stock, as trustees as aforesaid, and the petitioner, as such successor, is now entitled to all of the beneficial rights in said Trust No. 6781, among others, being the right now to receive interest upon said refunds as herein claimed.

6 14. The petitioner alleges that the allowance and payment of interest upon the aforesaid principal sum of \$3,252,268.91, refunded in May 1929 as set forth in paragraph 9 hereof is plainly comprehended by the provisions of Section 614 of the Revenue Act of 1928, and that in accordance with the provisions of said Section 614 interest should be allowed and paid upon said \$3,252,268.91, at the rate of six (6) per centum per annum from March 15, 1924 to a date not more than thirty (30) days prior to the date of said refund check in May 1929.

15. The petitioner has duly demanded of the respondent Burnet that he compute, authorize, allow, and direct payment of interest upon said refunds in accordance with the provisions of said Section 614 of the Revenue Act of 1928, which demand said respondent refused and continues to refuse. Petitioner has made like demand of the respondent Mills.

16. The petitioner further alleges that demand having been made, as aforesaid, to authorize and direct payment of interest upon said refunds and such demand having been refused, said action on the part of the respondents is without justification of law, and the computation, allowance and authorization and payment of interest by the respondents being a ministerial act required of them by law and not necessitating any exercise of discretion, petitioner is entitled to the relief from this Court sought hereby.

17. The petitioner alleges that prior to its coming into this Court it has exhausted all the remedies open to it to obtain the authorization and allowance of said interest due, as aforesaid, under the Revenue Act of 1928, and that its said demands having been unlawfully and unjustly denied, there is no other adequate remedy open to petitioner
7 except as herein sought.

Wherefore the petitioner prays:

1. That a rule may issue directing the respondents to appear before this Honorable Court and show cause, if any there be, why a writ of mandamus should not be issued commanding and directing respondents Burnet, and/or Mills and Woods to compute and allow interest at the rate of six (6) per centum per annum on \$3,252,268.91, from March 15, 1924, to a date not more than thirty (30) days prior to the date in May 1929 upon which refund checks to the order of the Alien Property Custodian, for said Trust No. 6781 aggregating said \$3,252,268.91 were dated, and to authorize and direct the proper disbursing officer to pay to the respondent Howard Sutherland, as Alien Property Custodian, for the account of the petitioner, the amount of the interest so computed.

2. That a writ of mandamus may issue to said respondents, Burnet, Mills and Woods commanding and directing them, or either of them, to compute and allow interest at the rate of six (6) per centum per annum on \$3,252,268.91 from March 15, 1924 to a date not more than thirty (30)
8 days prior to the date in May 1929 upon which refund checks to the order of the Alien Property Custodian for said Trust No. 6781 aggregating said \$3,252,268.91, were dated, and to authorize and direct the proper disbursing officer to pay to the Respondent, Howard Sutherland as Alien Property Custodian, for the account of the petitioner, the amount of the interest so computed.

3. For such other and further relief as the nature of the petition may require.

I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT,

By GEORGE F. VON KOLNITZ, JR.,

GEORGE F. VON KOLNITZ, JR.,

Attorney-in-fact.

CONWAY P. COE,

CONWAY P. COE,

Attorney for Petitioner,

803 National Press Building,

Washington, D. C.

GEORGE F. VON KOLNITZ, JR.,

GEORGE F. VON KOLNITZ, JR.,

Of Counsel.

9 DISTRICT OF COLUMBIA,
City of Washington, ss:

George F. Von Kolnitz, Jr., of the County of New York and State of New York, being duly sworn, says that he is the attorney in fact for the petitioner herein and as such is authorized to verify this petition, that he has read the foregoing petition, and that the matters of fact therein set forth are true to the best of his knowledge, information and belief.

GEORGE F. VON KOLNITZ, JR.

Subscribed and sworn to before me this 28th day of September, 1932.

[NOTARIAL SEAL.]

CATHARINE S. WILTON,

Notary Public, D. C.

Rule to Show Cause.

Filed September 28, 1932.

In the Supreme Court of the District of Columbia.

At Law.

No. 81,880.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Frankfurt A/M., Germany, Petitioner,
against

DAVID BURNET, Commissioner of Internal Revenue, 12th
Street and Constitution Avenue N. W., Washington,
D. C.; Ogden L. Mills, Secretary of the Treasury, 15th
Street and Pennsylvania Avenue N. W., Washington,
D. C.; W. O. Woods, Treasurer of the United States,
15th Street and Pennsylvania Avenue N. W., Washing-
ton, D. C.; Howard Sutherland, Alien Property Custodian,
Tower Building, Washington, D. C., Respondents.

Upon consideration of the petition of I. G. Farbenindustrie Aktiengesellschaft filed in the above entitled cause on the 28th day of September, 1932, it is by the court this 28th day of Sept., 1932,

Ordered that the respondent, David Burnet, Commissioner of Internal Revenue of the United States, the respondent, Ogden L. Mills, Secretary of the Treasury of the United States, the respondent W. O. Woods, Treasurer of the United States, and the respondent Howard Sutherland, Alien Property Custodian of the United States, appear in this court at 10 o'clock A. M. on the 12 day of Oct., 1932, and severally show cause, if any they have, why the prayer of said petitioner should not be granted and a writ of mandamus issued as therein prayed; provided, however a copy of this order be served upon each of the said respondents on or before the 8th day of Oct., 1932.

By the court:

PEYTON GORDON,
Justice.

11 In the Supreme Court of the District of Columbia.

At Law.

No. 81,880.

UNITED STATES ex rel., I. G. FARBEINDUSTRIE AKTIENGESellschaft, Frankfurt A/M., Germany, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN L. Mills, Secretary of the Treasury; W. O. Woods, Treasurer of the United States, and Howard Sutherland, Alien Property Custodian, Respondents.

*Answer of the Respondents to the Rule to Show Cause and
Petition for Writ of Mandamus.*

Filed November 14, 1932.

The respondents, David Burnet, Commissioner of Internal Revenue, Ogden L. Mills, Secretary of the Treasury, W. O. Woods, Treasurer of the United States, and Howard Sutherland, Alien Property Custodian, now and at all times saving and reserving unto themselves all manner of objection and exception to the imperfections, uncertainties and defects in the petition for a writ of mandamus filed herein, and reserving unto themselves the benefit of the lack of jurisdiction of this Court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of the Court to direct said respondents or any one of them to perform the act or acts in question, and relying on the same as if demurrer had been specifically
12 interposed, for answer to said petition, or so much thereof as is material, and to said rule to show cause, say:

1. They admit the averments of paragraph 1 of the petition.

2. Answering the averments of paragraph 2 of the petition the respondents admit the allegation that David Burnet is Commissioner of Internal Revenue of the United States. All the other allegations contained in said paragraph of the petition are conclusions of law which these respondents are

not required to answer, but insofar as they may be deemed to be allegations of fact they deny the same.

3-5. Answering the averments of paragraphs 3 to 5, inclusive, of the petition the respondents admit the allegations that Ogden L. Mills is Secretary of the Treasury; that W. O. Woods is Treasurer of the United States, and that Howard Sutherland is Alien Property Custodian of the United States. All the other allegations contained in said paragraphs of the petition are conclusions of law which these respondents are not required to answer.

6. The allegations of paragraph 6 of the petition are conclusions of law which these respondents are not required to answer.

7. The respondents admit the allegations of paragraph 7 of the petition.

8. They admit the allegations of paragraph 8 of the petition, except that they aver that the amount of taxes referred to in said paragraph as having been assessed and paid amounted in the aggregate to \$3,262,268.91.

13 9. They admit the allegations of paragraph 9 of the petition, except that they aver that the total amount of the taxes referred to in said paragraph as having been refunded to the Alien Property Custodian amounted to \$3,262,268.91, and that the date of said refund was May 15, 1929.

10-12. They admit the allegations contained in paragraphs 10 to 12, inclusive, of the petition.

13. Upon information and belief the respondents admit the averments of paragraph 13 of the petition that the petitioner has succeeded to all of the rights, titles and interest of the Farbenfabriken vormals Fr. Bayer & Company, which was the beneficial owner of all of the capital stock of the Bayer Company except qualifying shares at the time of the seizure of said stock, and for which Carl Duisberg, Christian Hess and Rudolph Mann held said stock as trustees, but they deny the allegations that the relator is entitled to all, or any, of the beneficial rights in Trust No. 6781, and has the right now to receive interest upon said refund as claimed in said petition.

14. The allegations contained in paragraph 14 of the petition are conclusions of law which these respondents are not required to answer, but insofar as they may be deemed to be allegations of fact the respondents deny the same.

15. Answering the averments of paragraph 15 of the petition the respondents say that the relator has demanded of the respondents Burnet and Mills that they compute, authorize, allow and direct payment of interest upon said refund of taxes, the relator basing his demands upon
14 the provisions of Section 614 of the Revenue Act of 1928, and the said respondents have refused and continue to refuse to compute, authorize, allow or direct payment of interest upon said refund of taxes for the reason that said respondents have no authority in law to compute, authorize, allow or direct payment of interest upon said refund; and further answering said paragraph of the petition the respondents say that said relator is a German corporation and an enemy of the United States within the meaning of the Act of Congress known and described as the "Trading with the Enemy Act," approved October 6, 1917 (c. 106, 40 Stat. 411), as amended, and is the successor to the Farbenfabriken vormals Fr. Bayer & Company, a German corporation, which likewise was and is an enemy of the United States within the meaning of said Trading with the Enemy Act, and that under Section 24 (e) of the Trading with the Enemy Act, as amended by the "Settlement of War Claims Act of 1928," approved March 10, 1928 (c. 167, 45 Stat. 254, 276), the taxpayer is precluded and barred from being credited or paid any interest or income whatsoever on the aforesaid refunded taxes.

16. Answering the averments contained in paragraph 16 of the petition the respondents deny the allegation that the refusal of the respondents Burnet and Mills to comply with the demand of the relator to compute, authorize, allow and direct payment of interest upon said refunded taxes is without justification of law, but aver that said respondents are precluded and barred by statute from complying with said demand of the relator; and the respondents further say that the computation, allowance, authorization and payment of interest on said refunded taxes by the respondents is not a ministerial act required of them by law.

15 Further answering paragraph 16 of the petition the respondents say that there is no mandatory duty on their part or any one of them to compute, authorize, allow or direct payment of interest upon the refunded taxes referred to in paragraph 9 of the petition or to take any other action looking toward the accomplishment of such

payment, but aver that under Section 24 (e) of the Trading with the Enemy Act, as amended (c. 167, 45 Stat., 254, 276), which was in full force and effect at the time said taxes were refunded to the Alien Property Custodian, they are expressly prohibited from taking any such action in regard to payment of interest on the refund of Internal Revenue taxes paid by the Alien Property Custodian on property seized by the Custodian under the Trading with the Enemy Act.

Further answering paragraph 16 of the petition the respondents say that there is no duty on the part of Ogden L. Mills as Secretary of the Treasury, W. O. Woods, as Treasurer of the United States, and Howard Sutherland as Alien Property Custodian, in connection with the computation, allowance, authorization and direction for payment of interest on said refunded taxes.

The respondents further deny the allegations that the computation, allowance, authorization and payment by them of the interest claimed by the relator in this action is a ministerial act required of them by law and not necessitating any exercise of discretion, and that the relator is entitled to the relief sought in this action.

17. The respondents deny the allegations contained in paragraph 17 of the petition.

16 Further answering the petition, these respondents aver that this Court is without jurisdiction to compel them or any of them by writ of mandamus to pay any interest to the taxpayer on internal revenue taxes refunded to the Alien Property Custodian.

Wherefore, having fully answered the petition for writ of mandamus and rule to show cause, the respondents pray that the petition be dismissed and the rule to show cause discharged with costs.

DAVID BURNET.

Commissioner of Internal Revenue.

OGDEN L. MILLS,

Secretary of the Treasury.

G. O. BARNES,

Assistant Treasurer of the United States, for

W. O. Woods, Treasurer of the United States.

HOWARD SUTHERLAND,

Alien Property Custodian.

LEO A. ROVER,
United States Attorney;
 JOHN W. FIHELLY,
Assistant United States Attorney;
 ROY ST. LEWIS,
Assistant Attorney General;
 THOMAS E. RHODES,
Special Assistant to the Attorney General;
 MARION HENDERSON,
Special Counsel for the Alien Property Custodian;
 PHILIP M. MARCUM,
Special Attorney in Alien Property Matters;
 HARRISON F. McCONNELL,
Attorney, General Counsel's Office,
Attorneys for Respondents.

17 CITY OF WASHINGTON,
District of Columbia, ss:

David Burnet, being first sworn, upon oath deposes and says that he is Commissioner of Internal Revenue of the United States; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes that the matters therein stated are true.

DAVID BURNET,
Commissioner of Internal Revenue.

Subscribed and sworn to before me this the 20th day of October, 1932.

[NOTARIAL SEAL.]

GEORGE W. KREIS,
Notary Public, D. C.

My commission expires Nov. 12, 1932.

CITY OF WASHINGTON,
District of Columbia, ss:

Ogden L. Mills, being first sworn, upon oath deposes and says that he is Secretary of the Treasury; that he has read the foregoing answer by him subscribed and knows the contents thereof, and that he verily believes that the matters therein stated are true.

OGDEN L. MILLS,
Secretary of the Treasury.
 E. D. W. F.

Subscribed and sworn to before me this the 24th day of October, 1932.

[NOTARIAL SEAL.]

SAMUEL H. MARKS,
Notary Public, D. C.

My commission expires Dec. 12, 1932.

18 CITY OF WASHINGTON,
District of Columbia, ss:

G. O. Barnes, being first sworn, upon oath deposes and says that W. O. Woods, Treasurer of the United States, one of the respondents above named, is absent from the City of Washington and will continue to be absent until about November 10, 1932; that he is Assistant Treasurer of the United States and as such is acting Treasurer in the absence of said W. O. Woods; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes that the matters therein stated are true.

G. O. BARNES,
Assistant Treasurer of the United States.

Subscribed and sworn to before me this the 31st day of October, 1932.

[NOTARIAL SEAL.]

ELLA F. VAN ZANDT,
Notary Public, D. C.

My commission expires Sept. 9, 1936.

CITY OF WASHINGTON,
District of Columbia, ss:

Howard Sutherland, being first sworn, upon oath deposes and says that he is Alien Property Custodian; that he has read the foregoing answer by him subscribed and knows the contents thereof; and that he verily believes that the matters therein stated are true.

[SEAL.]

HOWARD SUTHERLAND,
Alien Property Custodian.

Subscribed and sworn to before me this the 12th day of November, 1932.

[NOTARIAL SEAL.]

SOPHIE D. FREEMAN,
Notary Public, D. C.

My commission expires October 20, 1935.

19 In the Supreme Court of the District of Columbia.

At Law.

No. 81880.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Frankfurt A/M, Germany, Petitioner,
against

DAVID BURNET, Commissioner of Internal Revenue, 12th
Street and Constitution Avenue N. W., Washington,
D. C.; Ogden L. Mills, Secretary of The Treasury, 15th
Street and Pennsylvania Avenue N. W., Washington,
D. C.; W. O. Woods, Treasurer of the United States, 15th
Street and Pennsylvania Avenue N. W., Washington,
D. C.; Howard Sutherland, Alien Property Custodian,
Tower Building, Washington, D. C., Respondents.

Demurrer to Answer of Respondents.

Filed November 22, 1932.

The petitioner says that the answer of the respondents to the rule to show cause and the petition is bad in substance.

(1) The answer admits all of the material facts set forth in the petition, which facts present a case wholly within the provisions of section 614 of the Revenue Act of 1928 and show the petitioner entitled to the relief prayed for in the petition.

(2) Section 614 of the Revenue Act of 1928 prescribes the sole and exclusive rule governing interest on every refund of any internal revenue tax after June 28, 1928.

(3) Section 614 of the Revenue Act of 1928 expressly and/or by necessary implication repealed section 24(e) of the Trading with the Enemy Act, as amended, which said section 24 (e) is the sole provision of law relied upon by respondents in defense to this petition.

20 (4) Section 24 (e) of the Trading with the Enemy Act, as amended, has no application to the instant case in that said section, enacted March 10, 1928, is prospective and not retrospective in its effect and does not apply to cases where the tax was overpaid and the refund claim filed, as here, prior to its enactment.

(5) Retrospective construction or application of section 24 (e) of the Trading with the Enemy Act, as amended, would create grave doubts as to its constitutionality, which must be avoided.

(6) Retrospective construction or application of section 24 (e) of the Trading with the Enemy Act, as amended, would result in unjust and oppressive consequences which should be avoided.

(7) The Treaty of Friendship etc., between Germany and the United States, proclaimed October 14, 1925, vested in the petitioner the right to the interest here sought to be recovered.

(8) If section 24 (e) of the Trading with the Enemy Act, as amended, is construed to deprive the petitioner of the interest on refunds of internal revenue taxes here sought to be recovered, said section is unconstitutional, null and void and violative of the Fifth Amendment to the Constitution of the United States, in that,

(a) It deprives the petitioner of property rights vested in it prior to the enactment of said section.

(b) It arbitrarily and capriciously discriminated against the petitioner and accords it treatment different from that accorded other taxpayers entitled to interest on refunds of internal revenue taxes.

(c) It deprives the petitioner of its property without due process of law.

(d) It deprives the petitioner of just compensation for its private property which was taken for public use.

(9) Section 24 (e) of the Trading with the Enemy Act, as amended, and the Treaty of Friendship, etc., between Germany and the United States, proclaimed October 14, 1925, are in violent and irreconcilable conflict, with the result that,

21 (a) If the Treaty be deemed impliedly repealed by section 24 (e), then for the same reason section 614 of the Revenue Act of 1928 impliedly repealed section 24 (e).

(b) If the Treaty be not so repealed the petitioner is entitled to the benefits of section 614 of the Revenue Act of 1928.

(c) In either of the aforesaid events ((a) or (b) next above) the defense here, which is based solely on section 24 (e) completely falls.

(10) The answer of the respondents not only fails to deny any of the material facts set forth in the petition but affirmatively shows that the relief prayed for in the petition should be granted and an order should be entered granting the writ of mandamus against the respondents.

CONWAY P. COE,
GEORGE F. VON KOLNITZ, JR.,
Attorneys for Petitioner,
National Press Building, Washington, D. C.

22 Supreme Court of the District of Columbia.

Tuesday, January 17, 1933.

Session resumed pursuant to adjournment, Honorable Oscar R. Luhring presiding.

* * * * *

At Law.

No. 81880.

UNITED STATES ex Relatione I. G. FARBENINDUSTRIE
AKTIENGESELLSCHAFT, Petitioner,

vs.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN L. MILLS, Secretary of the Treasury; W. O. Woods, Treasurer of the United States, and Howard Sutherland, Alien Property Custodian, Respondents.

Comes now the petitioner by its attorney of record and elects to stand upon its demurrer filed herein to the answer of the respondents, and it appearing to the Court that said demurrer was overruled upon the 11th day of January, 1933, judgment is ordered in accordance therewith. Whereupon, it is ordered that the petition filed herein be, and the same is hereby dismissed and the rule discharged.

Wherefore it is considered that petitioner take nothing by this action, that the respondents go hence without day, be for nothing held and recover of petitioner its costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing judgment the petitioner by its attorney of record, in open court, notes an appeal to the

23 Court of Appeals of this District; whereupon, an undertaking to act as a cost bond is hereby fixed in the sum of One Hundred Dollars (\$100.00) with leave to deposit Fifty Dollars (\$50.00) cash with the clerk in lieu thereof.

Memorandum.

January 18, 1933.—\$50 deposited in lieu of undertaking on appeal.

24 In the Supreme Court of the District of Columbia.

At Law.

No. 81880.

UNITED STATES ex rel. I. G. FARBENINDUSTRIE AKTIENGESELLSCHAFT, Frankfurt A/M, Germany, Petitioner,

v.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN L. MILLS, Secretary of the Treasury; W. O. Woods, Treasurer of the United States, and Howard Sutherland, Alien Property Custodian, Respondents.

Stipulation.

Filed January 18, 1933.

It is stipulated and agreed by and between counsel for the petitioner and counsel for the respondents that the petition herein be and the same hereby is considered as amended in the following particular:

The total principal amount of the taxes which was refunded and paid to the Alien Property Custodian on May 15, 1929 was \$3,262,268.91 as set forth in paragraph nine of the answer and not \$3,252,268.91 as set forth in paragraph nine and elsewhere in the petition.

CONWAY P. COE,

GEORGE F. VON KOLNITZ, JR.,

Attorneys for Petitioner.

THOMAS E. RHODES,

Attorneys for Respondent.

25 In the Supreme Court of the District of Columbia.

At Law.

No. 81880

UNITED STATES ex Rel. I. G. FARBENINDUSTRIE AKTIEN-
GESELLSCHAFT, Frankfurt A/M, Germany, Petitioner,

v.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN
L. MILLS, Secretary of the Treasury; W. O. Woods,
Treasurer of the United States, and Howard Sutherland,
Alien Property Custodian, Respondents.

Assignment of Errors.

Filed January 18, 1933.

The petitioner hereby enters its appeal to the Court of Appeals of the District of Columbia from the final judgment made and entered in the above entitled cause on the 17th day of January, 1933.

The Supreme Court of the District of Columbia erred:

(1) In overruling the demurrer filed herein by the petitioner to the answer of the respondents.

(2) In failing to adjudge that the answer herein having admitted all of the material facts set forth in the petition and which facts presented a case wholly within the provisions of Section 614 of the Revenue Act of 1928, the petitioner was entitled to the relief prayed for in the petition.

(3) In failing to adjudge that Section 614 of the Revenue Act of 1928 prescribes the sole and exclusive rule gov-
26 erning interest on every refund of every Internal Revenue tax after June 28, 1928.

(4) In failing to adjudge that Section 614 of the Revenue Act of 1928 expressly and/or by necessary implication repeals Section 24E of the Trading with the Enemy Act as amended which said Section 24E is the sole provision of law relied upon by respondents in defense to this petition on its merits.

(5) In failing to adjudge that Section 24E of the Trading with the Enemy Act as amended has no application to

the instant case, in that said Section enacted March 10, 1928, is prospective and not restrospective in its application and effect and does not comprehend or apply to cases where the tax was overpaid and refund claim filed, as here, prior to its enactment.

(6) In failing to adjudge that restrospective construction or application of Section 24E of the Trading with the Enemy Act as amended would create grave doubts as to its constitutionality which must be avoided.

(7) In failing to adjudge that retrospective construction or application of Section 24E of the Trading with the Enemy Act as amended would result in unjust and oppressive consequences which should be avoided.

(8) In failing to adjudge that the treaty of friendship, etc., between Germany and the United States, proclaimed October 14, 1925, vested in the petitioner the right to the interest here sought to be recovered.

(9) In failing to adjudge that if Section 24E of the Trading with the Enemy Act as amended is construed to deprive the petitioner of the interest on refunds of internal revenue taxes here sought to be recovered said Section is unconstitutional, null and void, and violative of the Fifth
27 Amendment into the Constitution of the United States, in that

(a) It deprives the petition- of property rights vested in it prior to the enactment of said Section.

(b) It arbitrarily and capriciously discriminates against the petitioner and accords it treatment different from that accorded other taxpayers with respect to interest on refunds of internal revenue taxes.

(c) It deprives the petitioner of its property without due process of law.

(d) It deprives the petitioner of just compensation for its private property which was taken for public use.

CONWAY P. COE,

GEORGE F. VON KOLNITZ, JR.,

Attorneys for Petitioner.

Service of the above assignment of errors is hereby acknowledged this 18th day of January, 1933.

THOMAS E. RHODES,

Attorney for the Respondent.

28 In the Supreme Court of the District of Columbia.

At Law.

No. 81880

UNITED STATES ex rel. I. G. FARBENINDUSTRIE AKTIENGESELL-
SHAFT, Frankfurt A/M, Germany, Petitioner,

v.

DAVID BURNET, Commissioner of Internal Revenue; OGDEN
L. MILLS, Secretary of the Treasury; W. O. Woods,
Treasurer of the United States, and Howard Sutherland,
Alien Property Custodian, Respondents.

Designation of Record on Appeal.

Filed January 18, 1933.

The Clerk will please prepare the transcript for appeal
in the above entitled cause including therein

- (1) Petition for writ of mandamus.
- (2) Rule to show cause.
- (3) Answer of the respondents to the rule to show cause
and petition for writ of mandamus.
- (4) Demurrer to answer of respondents.
- (5) Judgment.
- (6) Notation of deposit of \$50.00 as security for costs
on appeal.
- (7) Assignment of errors.
- (8) This designation of record.
- (9) Stipulation.

CONWAY P. COE,
GEORGE F. VON KOLNITZ, JR.,
Attorneys for Petitioner.

Service of the above designation of record is hereby
acknowledged this 18th day of January, 1933.

THOMAS E. RHODES,
Attorney for the Respondents.

29 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 81880 at Law, wherein I. G. Farbenindustrie Aktiengesellschaft is Petitioner and David Burnet, Commissioner of Internal Revenue, et al., are Respondents, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 19th day of January, 1933.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5888. United States ex relatione I. G. Farbenindustrie Aktiengesellschaft, appellant, vs. David Burnet, Commissioner of Internal Revenue, et al. Court of Appeals, District of Columbia. Filed Jan. 20, 1933. Henry W. Hodges, Clerk.

FOR MR. JUSTICE VAN ORSDIEL

FEB 6 - 1933

IN THE *Henry A. Hodges*
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA *ELENK*
JANUARY TERM, 1933.

No. 5888

UNITED STATES, ex relatione, I. G.
FARBENINDUSTRIE AKTIENGESELLSCHAFT,
Frankfurt A/M, Germany, APPELLANT,

v.

DAVID BURNET, Commissioner of Internal Revenue,
OGDEN L. MILLS, Secretary of the Treasury,
W. O. WOODS, Treasurer of the United States, and
HOWARD SUTHERLAND, Alien Property Custodian, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF FOR APPELLANT.

CONWAY P. COE,
Attorney for the Appellant.

GEORGE F. von KOLNITZ, JR.,
Of Counsel.

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IN THE
COURT OF APPEALS OF THE DISTRICT OF COLUMBIA
JANUARY TERM, 1933.

No. 5888

UNITED STATES, ex relatione, I. G.
FARBENINDUSTRIE AKTIENGESELLSCHAFT,
Frankfurt A/M, Germany, APPELLANT,

v.

DAVID BURNET, Commissioner of Internal Revenue,
OGDEN L. MILLS, Secretary of the Treasury,
W. O. WOODS, Treasurer of the United States, and
HOWARD SUTHERLAND, Alien Property Custodian, APPELLEES.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a final judgment of the Supreme Court of the District of Columbia dismissing appellant's petition for a writ of mandamus to compel the Commissioner of Internal Revenue to compute and allow, and to compel the Treasurer of the United States thereupon to pay to the Alien Property Custodian for appellant's account, under Section 614 of the Revenue

Act of 1928, interest on a tax refund which was made to the Alien Property Custodian for the appellant's account in May, 1929.

Mr. Justice Lohr, below, overruled appellant's demurrer to appellee's answer to appellant's petition. Appellant stood on its demurrer, a final judgment of dismissal of appellant's petition was entered, and this appeal is prosecuted from said final judgment.

No opinion was rendered by Mr. Justice Lohr in the court below.

The appellant was the petitioner below and will hereafter for convenience be referred to as "the petitioner". The appellees who were respondents below will hereafter for convenience be referred to as "the respondents".

FACTS

The facts are not in dispute and are substantially as follows: In January, 1918, the Alien Property Custodian seized the capital stock of an American corporation held by three individuals as trustees for a German corporation. The petitioner is the successor in interest of the German corporation which was the beneficial owner of the stock at the time of the seizure. After the Alien Property Custodian had made the seizure of the stock in question, he sold it for \$5,296,232.36 and deposited said amount in the treasury of the United States in an identified trust account. Under the Trading with the Enemy Act, Section 12, such moneys were invested in securities of the United States.

On March 15, 1924, Internal Revenue Taxes assessed against the three individuals from whom the stock was

seized, in the aggregate amount of \$3,262,268.91, were paid by the Alien Property Custodian out of the moneys (or U. S. securities) constituting the deposit of the said identified trust account. The Custodian thereupon filed claims for refund of the taxes so paid, and these claims were allowed in full and the total sum of \$3,262,268.91 was repaid to the Custodian on March 15, 1929, but the refunds thus made included no interest. In other words, instead of restoring to the fund the securities of the United States in which the seized property had been invested (and which had been used to pay the taxes assessed) together with the coupons attached thereon, the refund was made in effect with United States securities having all coupons cut therefrom for the interim between the date that the Custodian had paid the taxes in 1924 and the date on which the taxes were refunded in 1929. That this condition is one which involves a material injustice and damage to the integrity of the fund which the Custodian was to administer as a trustee, is manifest.

Between the time that the claims for refund were made by the Custodian and the time that the claims were allowed, the Settlement of War Claims Act of 1928 was approved on March 10, 1928 and still later, the Revenue Act of 1928 became a law on June 28, 1928.

The latter act by its terms expressly provided that "interest shall be allowed and paid upon *any* overpayment in respect of *any* Internal Revenue Tax at the rate of six per centum."

As the Custodian's claims for refund were allowed in 1929, at a time when the foregoing provision of the Revenue Act of 1928 was in full force and effect, peti-

tioner claims that as the amount claimed by and paid to the Custodian for refund was unquestionably an "over-payment in respect of an Internal Revenue Tax", the Custodian was entitled not only to a repayment of the principal amount of his over-payment but to interest at the rate of 6% thereon from the date on which the over-payment was made by the Custodian to the date specified in the Revenue Act of 1928, to wit, to a date preceding the date of the refund check by not more than thirty days.

The petitioner being admittedly the beneficial owner of the claims to the refund at the time the refund was made, the petitioner's rights in respect of the claimed interest resting securely upon a statute whose language is entirely unambiguous and clear, requested the authorities to compute the said interest and to pay it to the Custodian for petitioner's account. The authorities refused and as no question of fact was in dispute and the duties of the authorities in the premises were purely ministerial, petitioner applied for a writ of mandamus to have the interest computed and allowed by the Commissioner of Internal Revenue and upon such allowance to have the Treasury officials pay the sum so computed and allowed to the Alien Property Custodian for the benefit of the petitioner.

The respondents filed an answer, admitting in substance all of the facts, raising technical questions which challenged the jurisdiction of the court and mandamus as the proper remedy, and then alleged, as the chief defense, that as a matter of law the petitioner was not entitled to the relief sought because in Section 18 of the Settlement of War Claims Act of 1928, Congress,

in amending Section 24 of the Trading with the Enemy Act, had on March 10, 1928 (prior to the enactment of the Revenue Act of 1928) enacted Section 24(e) of the Trading with the Enemy Act. That Section, 24(e), as will be hereafter shown, provides that no interest should be paid to the taxpayer on refunds on those Internal Revenue Taxes only which were for the first time imposed by the Settlement of War Claims Act and that, therefore, said Section 24(e) has no bearing on the issues involved in this case.

The petitioner therefore demurred to the answer as bad in law in that said Section 24(e) had no application to the case at bar and that to the extent that Section 24(e) of the Trading with the Enemy Act as amended on March 10, 1928 might be interpreted to be at variance with the provisions of the Revenue Act of May 28, 1928, the latter act directly or by necessary implication repealed the former and furthermore that if Section 24(e) of the Trading with the Enemy Act as interpolated into said act by the Settlement of War Claims Act of 1928 was interpreted as affecting allowable claims in existence prior to March, 1928, its provisions were in violation of the fifth amendment of the Constitution and of the treaty of friendship between the United States and Germany proclaimed October 14, 1925.

When the court below over-ruled the demurrer without opinion, petitioner stood upon its demurrer and the present appeal followed the entry of the final judgment of the Supreme Court of the District of Columbia dismissing petitioner's petition.

THE ERRORS RELIED UPON

The errors relied upon by the appellant appear fully in the Assignment of Errors (Record p. 19-20). The most important of these are:

1. That the Court erred in failing to adjudge that Section 24(e) of the Trading with the Enemy Act, as amended, the sole provision of law relied upon by respondents in defense to the petition on its merits, has no application to the instant case.

2. That the Court erred in failing to adjudge that Section 614 of the Revenue Act of 1928 expressly and/or by necessary implication repealed said Section 24(e) of the Trading with the Enemy Act, as amended.

3. That the Court erred in failing to adjudge that said Section 24(e) of the Trading with the Enemy Act, as amended, is unconstitutional, null, and void, and violative of the Fifth Amendment.

4. That the Court erred in failing to adjudge that the Treaty of Friendship, etc., between Germany and the United States proclaimed October 14, 1925, vested in the petitioner the right to the interest here sought to be recovered.

5. That the Court erred in failing to adjudge that the admitted facts herein present a case wholly within the provisions of Section 614 of the Revenue Act of 1928 and entitled the petitioner to the relief sought.

STATUTES.

The petitioner bases its right to the recovery here sought upon the plain, unambiguous provisions of Section 614 of the Revenue Act of 1928 which is as follows:

REVENUE ACT OF 1928 (APPROVED MAY 29, 1928)

"Sec. 614 Interest on Overpayments.

- (a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum, as follows:

(1) In the case of a credit, from the date of the over-payment to the due date of the amount against which the credit is taken, but if the amount against which the credit taken is an additional assessment of a tax imposed by the Revenue Act of 1921 or any subsequent revenue Act, then to the date of the assessment of that amount.

(2) In the case of a refund, from the date of the over-payment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

- (b) As used in this section the term 'additional assessment' means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924 or by any subsequent revenue act.

- (c) Section 1116 of the Revenue Act of 1926 is repealed.
- (d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any credit taken or refund paid after the expiration of such period, even though allowed prior thereto."

The respondents base their defense on the merits wholly on Section 24(e) of the Trading with the Enemy Act as amended, which, together with its accompanying provisions is as follows:

**TRADING WITH THE ENEMY ACT AS AMENDED
MARCH 4, 1923.**

"Section 24. The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

SETTLEMENT OF WAR CLAIMS ACT OF 1928
(APPROVED MARCH 10, 1928)

"TAXES

Sec. 18. Section 24 of the Trading with the Enemy Act, as amended, is amended by inserting '(a)' after the section number and by adding at the end of such section new subsections to read as follows:

"(b) In the case of income, war-profits, excess, profits, or estate taxes imposed by any Act of Congress, the amount thereof shall, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, be computed in the same manner (except as hereinafter in this section provided) as though the money or other property had not been seized by or paid to the Alien Property Custodian, and shall be paid, as far as practicable, in accordance with subsection (a) of this section. Pending final determination of the tax liability the Alien Property Custodian is authorized to return, in accordance with the provisions of this Act, money or other property in any trust in such amounts as may be determined, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, to be consistent with the prompt payment of the full amount of the internal-revenue taxes.

"(c) So much of the net income of a taxpayer for the taxable year 1917, or any succeeding taxable year, as represents the gain derived from the sale or exchange by the Alien Property Custodian of any property conveyed, transfer-

red, assigned, delivered, or paid to him, or seized by him, may at the option of the taxpayer be segregated from the net income and separately taxed at the rate of 30 per centum. This subsection shall be applied and the amount of net income to be so segregated shall be determined, under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, as nearly as may be in the same manner as provided in section 208 of the Revenue Act of 1926 (relating to capital net gains), but without regard to the period for which the property was held by the Alien Property Custodian before its sale or exchange, and whether or not the taxpayer is an individual.

“(d) Any property sold or exchanged by the Alien Property Custodian (whether before or after the date of the enactment of the Settlement of War Claims Act of 1928) shall be considered as having been compulsorily or involuntarily converted, within the meaning of the income, excess-profits, and war-profits tax laws and regulations; and the provisions of such laws and regulations relating to such a conversion shall (under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury) apply in the case of the proceeds of such sale or exchange. For the purpose of determining whether the proceeds of such conversion have been expended within such time as will entitle the taxpayer to the benefits of such laws and regulations relating to such a conversion, the date of the return of the proceeds to the person entitled thereto shall be considered as the date of the conversion.

“(e) In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

“(f) The benefits of subsections (c), (d), and (e) shall be extended to the taxpayer if claim therefor is filed before the expiration of the period of limitations properly applicable thereto, or before the expiration of six months after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is the later. The benefits of subsection (d) shall also be extended to the taxpayer if claim therefor is filed before the expiration of six months after the return of the proceeds.”

ARGUMENT

I.

JURISDICTION.

The court below had jurisdiction herein because,

- (a) This is a suit of a civil nature involving more than \$3,000. and arises under the constitution and/or laws of the United States, and/or treaties made, and/or is between citizens of a

State and a foreign state, within section 24, amended, of the Judicial Code (U.S.C.A. Title 28, section 41 (1) ; and/or,

- (b) This is a case arising under internal revenue laws within section 24, amended, of the Judicial Code (U.S.C.A. Title 28, section 41 (5)).

In *Binderup v. Pathe Exchange* 263, U.S. 291 the court said:

“Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as fact. A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; * * * Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit.”

The respondents challenged the jurisdiction of the court below on the theory that the Internal Revenue Taxes which had been assessed in 1924 and on the refund of which the petitioner claims that interest should have been paid, were assessed against petitioner's property in the hands of the Alien Property Custodian and therefore petitioner's remedy, if any, was by way of a Bill in Equity under Section 9 of the Trading with the Enemy Act and not by way of mandamus. Respondents' argument is founded upon a misconception.

Section 9 of the Trading with the Enemy Act, moreover, has no application whatsoever to the present case.

The true situation is, as alleged in the petition and admitted by the answer, that income taxes in said amount were assessed *against the relator's predecessors personally*, and not *against any property* in the hands of the Alien Property Custodian. The Court will appreciate the distinction. Income taxes are obviously not *in rem*, but *in personam*. The source from which such taxes are paid manifestly has nothing to do with the right of the taxpayer to refunds and interest thereon.

From the respondents' erroneous premise, they argue that this Court is without jurisdiction of this action because Congress, by the Trading with the Enemy Act, has provided that a Bill in Equity against the Alien Property Custodian is the sole remedy whereby property which was seized by the Custodian can be recovered from him. But the petitioner is hereby seeking to recover nothing from the Alien Property Custodian which he at any time seized or indeed anything by virtue of the Trading with the Enemy Act. This is a proceeding grounded upon Section 614 of the Revenue Act of 1928. It is precisely like *U. S. ex rel. Escher v. Burnet*, (unreported but cited in Commerce Clearing House, Federal Tax Service, 1933 edition, par. 1812, 205) wherein the Court below granted Mandamus.

Moreover, the Treaty of October 14, 1925, between Germany and the United States provides:

"The Nationals of each High Contracting party shall enjoy freedom of access to the Courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, *and in all degrees of jurisdiction established by law.*" (Italics supplied)

Respondents' argument that the Court below was without jurisdiction is clearly without merit.

II.

MANDAMUS IS THE PROPER REMEDY.

This is a mandamus proceeding whereby the petitioner seeks to have the court compel the Commissioner of Internal Revenue and/or the Secretary of the Treasury, and the Treasurer of the United States to authorize, compute, and allow and pay interest on a refund of internal revenue taxes. *The facts are not in dispute.*

In *Blair v. Birkenstock*, 6 Fed. (2nd) 679, 55 App. D.C. 376, this court said:

"No question of fact is involved in this case, nor is the appellant required to exercise any discretion when allowing interest upon such refunds. The duty is ministerial only, and is mandatory. Upon the facts in the case the appellants have no other adequate remedy. They are therefore entitled to a writ of mandamus."

(Citing Cases)

In the *Birkenstock* case the Commissioner determined that the interest on the refund in question was controlled by Section 1324 of the Revenue Act of 1921, just as he has here determined that the interest here sought is controlled by Section 24(e) of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928. This Court in the *Birkenstock* case held that the Commissioner should have determined that the interest in question was controlled by

another statute, namely Section 1109 of the Revenue Act of 1924 and ordered Mandamus accordingly, just as it is submitted that the Court in the instant case should hold that the Commissioner should have determined that the interest here sought is controlled by the plain, unambiguous, mandatory provisions of Section 614 of the Revenue Act of 1928.

The respondents in support of their argument that Mandamus is not the proper remedy attempted below to distinguish the *Birkenstock* case, but no effective distinction is possible.

Respondents also cited in support of their argument certain language, separated from its context, appearing in *Roberts v. U. S.*, 176 U.S. 221, and argued therefrom in substance that because the Commissioner was compelled to read Sections 24(e) and 614, and make his determination thereafter, he was performing a quasi-judicial function. But the Supreme Court in the recent case, *U. S. v. Wilbur*, 280, U.S. 306, quoting from the very case of *Roberts v. U. S.*, supra, has completely annihilated this argument. The Court says:

“Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to

perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that act be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required."

To like effect is *Wilbur v. U. S.*, 281 U.S. 206 at 218, wherein the court said:

"The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated."

That Mandamus is the proper remedy in cases precisely like this was decided by the Supreme Court of

¹⁷
the District of Columbia in the un-
reported case of *U. S. ex rel. Escher v. Burnet* (supra).
In the Escher case the very statutes here involved,
namely Section 24 (e) and Section 614 were before the
Court, and the same Commissioner of Internal Reve-
nue, Burnet, the respondent there and here, was ordered
by writ of Mandamus to compute, authorize, allow and
pay interest pursuant to the provisions of Section 614.
The said respondent after an appeal to this Court,
abandoned his appeal, acquiesced in the decision, and
paid the interest. Can he now be heard to say that
Mandamus is not the proper remedy in this case? In
any event under this Court's decision in *Blair v. Birk-
enstock* supra the question of whether Mandamus is
the proper remedy is no longer open to debate.

III.

**THE ADMITTED FACTS PRESENT A CASE
WHOLLY WITHIN THE PROVISIONS OF SEC-
TION 614 OF THE REVENUE ACT OF 1928
AND SHOW THE PETITIONER ENTI-
TLED TO THE RELIEF PRAYED FOR
IN THE PETITION.**

Section 614 of the Revenue Act of 1928 (supra p. 7),
upon which, among other things, the petitioner bases
its right to the relief here sought, provides in simple,
plain, unambiguous, affirmative and mandatory lan-
guage, without exception, proviso, reservation or quali-
fication that interest shall be allowed and paid upon
any overpayment of any internal revenue tax.

It is significant to note that the Revenue Act of 1928
was obviously drawn with care. This Act may well be

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said to represent the then formost stage in the evolution of internal revenue jurisprudence. At the time of its passage Congress had the benefit of the administrative and judicial experience and expressions under the successive Revenue Acts of 1913, 1916, 1917, 1918, 1921, 1924, and 1926, and therefore will not lightly be deemed guilty of inadvertance in its wording.

Throughout the Act there appears the studied purpose to qualify and limit words of comprehensive scope by appropriate exceptions whenever Congress intended to except from their application any subjects upon which it had previously legislated. Thus Section 619 of the Act amends Section 3220 of the Revised Statutes by inserting the words "Except as otherwise provided by law", etc.; it likewise amends Section 3228 of the Revised Statutes by inserting the same expression, "Except as otherwise provided by law" etc.; and it amends Section 1109 of the Revenue Act of 1926 by inserting the words "Except in the case of income etc. taxes".

How simple and how consonant with its aforesaid purpose would it have been for Congress to have inserted the words "Except as otherwise provided by law" after the words "any overpayment in respect of any internal revenue tax" of subdivision (a) of Section 614 of the Revenue Act of 1928, if it had in fact intended to except from the operation of said section refunds paid to the Alien Property Custodian. Instead Congress provided by said section 614 in comprehensive, unlimited and mandatory terms without exception, *a new rule* applicable to any refund of *any* internal revenue tax after June 29, 1928.

Moreover, Title I of the Revenue Act of 1928, which deals solely with the income tax for 1928 and subsequent years, its basis, rates, etc. contains the following significant provision:

"Section 61. Laws made applicable.

All * * * special * * * provisions of law * * * so far as applicable are hereby extended to and *made a part of this title.*"

It will be noted that such special laws are not "made a part of this act", but *only a part of Title I of the Act.*

No counterpart of Section 61 is found in Title IV of the Act wherein occurs Section 614 providing for interest upon *any* refund of *any* internal revenue tax. The only logical inference from this is that Congress, by Title IV, intended to prescribe the sole rules applicable to the subjects thereby covered, among which, as we have seen, is interest upon refunds.

The situation is thus squarely within the rule announced by the Supreme Court in *Iselin v. U. S.*, 270 U. S. 245, 70 L. Ed. 566, wherein the Court said:

"The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the Court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

If Congress inadvertently omitted to include in Section 614 the words "except as otherwise provided by law" and likewise inadvertently omitted to include un-

der Title IV a section substantially corresponding to Section 61 of Title I (though it will not lightly be presumed that such double omissions were inadvertent) they will not be judicially supplied in the face of the plain, unambiguous language of Section 614.

Indeed, where the language of a statute is so plain as that of Section 614, it is not permissible to go outside of such language to seek the Congressional intent. The Court must confine itself to the language used and apply the statute as found. Thus in *Caminetti v United States*, 242 U. S. 470, 485, the Supreme Court said:

“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, *and if that is plain*, and if the law is within the constitutional authority of the law-making body which passed it, *the sole function of the courts is to enforce it according to its terms.*”

* * * *

“Where the language is plain and admits of no more than one meaning *the duty of interpretation does not arise.*” (Italics supplied)

Numerous authorities to like effect would only burden this brief.

The language of Section 614 is so perfectly plain that it admits of but one meaning, namely that this section “shall be applicable to *any* refund paid” after June 28, 1928, and “interest *shall* * * * be paid upon *any* overpayment * * * of any internal revenue tax” at 6 percent per annum.

The words “any refund” of course can only mean every refund. But, in the language of the Supreme

Court in *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 561:

“If there were doubt as to the connotation of the term and another meaning might be adopted, *the fact of its use in a tax statute* would incline the scale to the construction most favorable to the taxpayer.” (Italics supplied)

The answer herein admits that the refunds in question were paid after June 28, 1928, to wit, on May 15, 1929, without interest. Under the plain provisions of Section 614, and the rule of *Caminetti v. United States*, supra, it follows that the petitioner is entitled to the relief here sought.

IV.

THE RESPONDENTS' SOLE DEFENSE TO THE PETITIONER'S RIGHT, ON THE MERITS, TO HAVE THE INTEREST ON THE REFUND WHICH WAS MADE TO THE ALIEN PROPERTY CUSTODIAN COMPUTED AND THEN PAID TO THE CUSTODIAN FOR PETITIONER'S ACCOUNT, IS WITHOUT MERIT OR SUBSTANCE.

The respondents, by their answer, say that the petitioner is not entitled to the relief it has sought because Section 24 (e) of the Trading with the Enemy Act as amended by the Settlement of War Claims Act negatives the petitioner's rights under Section 614 of the Revenue Act of 1928.

This is the sole matter of alleged defense to the merits which the respondents interpose in the case.

The petitioner takes the position that this supposed

defense is bad in law; that Section 24 (e) correctly interpreted has no bearing on or relation to the facts which underlie the instant proceeding; that Section 24 (e) was concerned solely with interest on tax refunds arising out of assessments made pursuant to the directions of the Settlement of War Claims Act of 1928 and was not concerned in any way with refunds of taxes erroneously collected in prior years; that Section 24 (e) was wholly prospective and not retrospective; that any other interpretation of Section 24 (e) renders it unconstitutional as violating the Fifth Amendment of the Constitution and of the provisions of the Treaty of Friendship of 1925 between the United States and Germany; that in any event, if Section 24 (e) should be construed to be at variance with anything contained in Section 614 of the Revenue Act of 1928, Section 24 (e) was directly or by necessary implication repealed by the later Act.

The petitioner's position relative to these several matters will be presented in the next following points.

V.

SECTION 24 (e) OF THE TRADING WITH THE ENEMY ACT, AS AMENDED, THE SOLE PROVISION OF LAW RELIED UPON BY RESPONDENTS IN DEFENSE TO THE PETITION ON ITS MERITS, HAS NO APPLICATION TO THE INSTANT CASE.

The sole defense to the petition on the merits is based upon Section 24 (e) of the Trading with the Enemy Act, as amended, *supra*. The petitioner respectfully

submits that said section has no application to the instant case and constitutes no defense to the petition herein, for the reason among others that its provisions only comprehend interest on refunds of "such taxes" as were due from the *taxpayer* under that Act and were computed and paid subsequent to its enactment in accordance with the rules for such computation which were for the first time prescribed by its accompanying provisions, all of which were enacted on March 10, 1928. The taxes here in question having been paid by the Alien Property Custodian on March 15, 1924 were not subject to the provisions of the later Act. In other words, the petitioner submits that said Section 24 (e) is prospective and not retrospective in its application and effect and has no application whatsoever to cases where a tax was overpaid by the Alien Property Custodian and the refund claim filed by the Alien Property Custodian as here, long prior to its enactment.

That said Section 24 (e) is prospective and only comprehends interest on the refunds of "such taxes" as were assessed and paid subsequent to its enactment, on March 10, 1928, and in accordance with the rules of computation at the time first prescribed, is the inescapable conclusion, from a consideration of the Section itself, its correlative and accompanying provisions enacted at the same time, and its obvious purpose, as hereinafter set forth.

The Settlement of War Claims Act by Section 18 entitled "*Taxes*" amended Section 24 of the Trading with the Enemy Act, as amended, by adding new sub-

sections thereto *which for the first time* prescribed rules for the determination of the federal tax liability of persons whose property had been seized by the Alien Property Custodian. (One of said sub-sections became said Section 24 (e).

The "Taxpayer" referred to in this Act and in the several sub-sections was not the Alien Property Custodian but the party whose property had been seized. Thus Section 24 (c) provided that:

"So much of *the net income of a taxpayer* for ~~the~~ taxable year 1917, or any succeeding taxable year, as represents the gain derived from the sale or exchange *by the Alien Property Custodian* * * * may at the option of the taxpayer be * * * separately taxed at the rate of 30 per centum. * * * (Italics supplied)

Clearly the foregoing constitutes express Congressional recognition that the person whose property was seized, and not the Alien Property Custodian, *was the taxpayer*.

The alien was made a taxpayer by this Act. He was not a taxpayer prior thereto since aliens whose property had been seized retained no beneficial rights of any kind or character whatsoever either legal or equitable in or with respect to any of the funds which the Alien Property Custodian had established as the result of any seizure or sale of seized property. *U. S. v. Chemical Foundation*, 272 U. S. 1, 11.

Accordingly aliens whose property had been seized and who therefore had no interest whatsoever in the seized property thereafter or until Congress might legis-

late further with reference thereto, were not liable under the tax laws or revenue laws of the United States with respect to such seized property.

The Alien Property Custodian on the other hand was in possession of the seized property and of the proceeds of sales of seized property in the capacity of a trustee for the people of the United States charged with the duty to maintain the integrity of the funds both as to principal and interest until Congress might direct what disposition might be made of such funds. His duty under the Trading with the Enemy Act included the requirement that he should deposit seized funds and proceeds from the sale of seized property with the Treasury in order that they might be invested in securities of the United States so that not only the principal might be secure but that it might earn interest during the tenure of the funds by the Treasury for the account of the Alien Property Custodian.

The Alien Property Custodian, as a public official, was, of course, not subject to any duty to pay income, profits, or estate taxes under any revenue act of the United States. There were some instances, however, where he had seized real estate or other property subject to local taxation and he was therefore in such cases empowered and "authorized to pay all taxes (including special assessments) * * * lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States" under the Trading with the Enemy Act. This authorization to pay such local, municipal and similar taxes was enacted on March 4, 1923 as Section 24 of

the Trading with the Enemy Act. Said Section 24 of 1923, now section 24 (a) has no application or relation to the payment of any federal income, profits, or estate taxes whatsoever.

In 1923 Congress enacted the so-called Winslow Bill (42 Stat. 1511) under which the Custodian was authorized to pay to certain former alien enemies (not all of them) amounts not in excess of Ten Thousand Dollars (\$10,000.—) of the principal and not in excess of Ten Thousand Dollars (\$10,000.—) out of interest earned annually thereafter, out of whatever funds had been established by the Custodian from proceeds of property seized from such aliens. No income taxes were provided for in this Act but the Act did provide [in sub-section (i) of Section 9 of the Trading with the Enemy Act as amended by the Winslow Bill] that all accumulated "income, dividends, interest, and other net earnings" (up to March 4, 1923) should for the purposes of the payments aforesaid "be considered as part of the principal".

The Winslow Bill, in providing for the limited payments set forth, left the question of the alien's interest in the funds (beyond the \$10,000.—sums of the Winslow Bill) and the questions whether, and if so, how any income or profits included in the corpus of the several funds were ultimately to be taxed, entirely untouched and for the future action of Congress.

In March 1928 conditions being as hereinbefore described, Congress applied itself in a careful and painstaking way to the task of solving all of the problems which had grown out of the seizure, use, or administration by the Government of alien enemy property

and to that end passed the Settlement of War Claims Act of 1928 covering all the several phases of the relations of the United States toward alien enemy property.

In that Act it was, among other things, provided that in the case of marchant ships which had been taken from the enemy by the Government of the United States the original alien owners (with the exception of members of the reigning houses) were entitled to fair compensation for the value of the ships when taken. In the case of patents or licenses under patents acquired by the United States or patents which had been used by the United States, the United States was directed to pay to the original owners of said patents the fair and reasonable value of whatever the United States had taken. Congress further provided that the original owners of a radio station which had been seized were also entitled to fair compensation for the value thereof. In order that the fair compensation for these items might be determined, a War Claims Arbiter was created with unlimited and supreme power to determine unappealably the fair value of the items and generous provision was made by the appropriation of a sum not in excess of \$100,000,000.— to cover the awards which might be made by the Arbiter. As a matter of fact under these provisions of the Settlement of War Claims Act of 1928 the Arbiter certified a total sum of awards of something over \$90,000,000.— to the Treasury and the exact sum so certified was then paid into the German Special Deposit Fund out of the appropriation for which the act had provided.

With respect to the seizures of other property by the Alien Property Custodian, Congress provided that the several funds maintained by the Custodian should from then on be considered to be beneficially owned by the aliens from whom the property had been seized. These properties, previously owned by the Custodian as trustee for the People of the United States, and therefore not previously subject to any taxes, except the local, etc. taxes of Section 24, included, by 1928, income, profits, and inheritance situations, and Congress therefore made provision that in connection with the allocation to the aliens of an interest in the respective funds, the aliens should pay certain taxes.

The tax scheme adopted for this purpose was a totally new one. The new and special tax imposition devised by Congress was pertinent only to and limited to the funds and property in the hands of the Custodian. It differed in many ways from the general tax laws pertaining to citizens and others. The new method adopted for the computation of the taxes with respect to Alien Property Custodian funds was in effect based on a supposition which was not a fact, i. e. that the computation was to be made on the basis of an imagined conception that there never had been any seizure at all and that the Custodian had been merely a receiver or conservator. Having started with this imaginary condition, taxes were to be computed at the rates provided by the General Revenue Acts for the several years covered by the Custodian's administration of the seized funds with respect to income, excess profits, and estate taxes.

The figures of this computation were the figures of the old Revenue Acts but the law making those figures applicable to Custodian funds was the Settlement of War Claims Act of 1928 and not any provision contained in any prior statute.

This is illustrated very clearly by the circumstance that the taxpayer under the new tax rule of the Settlement of War Claims Act of 1928 was not made subject to the rates prevailing with respect to profits under the Revenue Acts in force in the earlier years but the taxpayer was given an election under 24 (c) of paying either the rates as set out in the schedules of the prior acts or 30% flat. As practically all sales by the Custodian were made at a time when the rates under the Revenue Acts for profits taxes were materially higher than 30%, the 30% figure was accepted by practically all claimants, yet Congress was entirely fair and careful in the provision that the taxpayer might have his election, since it would have been unjust, for example, to impose a 30% tax generally for a period which might include the years immediately prior to 1928, when the profits tax in the case of corporations, was for example, materially less.

Then there was another class of cases which had to be provided for and those were the cases where the Custodian had sold or might still sell seized property and invest and reinvest the proceeds. As to this class of cases Congress provided in Section 24 (d) that

“Any property sold or exchanged by the Alien Property Custodian (whether before or after the date of the enactment of the Settlement of War

Claims Act of 1928) shall be considered as having been compulsory or involuntarily converted within the meaning of the income, excess profits, and war profits tax laws and regulations; and the provisions of such laws and regulations ~~when~~ ^{relating to} ~~made into~~ such a conversation shall * * * apply in the case of the proceeds of such sale or exchange."

It is apparent that in the foregoing provisions Congress adopted for the Alien Property Custodian funds a wholly new taxing scheme, devised peculiarly for the situation as it was found to exist in 1928. Nothing like such a taxing scheme had existed before and until Congress declared itself with respect thereto nobody knew or could know what it was going to be.

In the new scheme of subjecting the Custodian's funds to income, etc. taxes according to the above principles, a special method of computation, of collection, and of payment was devised and embodied in Section 24 (b). According to this section the Custodian, first ascertaining how much was claimed by the Commissioner of Internal Revenue for taxes on income and profits, was to withhold sufficient money to cover the tax liability "pending final determination" thereof and then to return so much of the balance of the fund as was returnable pursuant to the other provision of the Act. The alien in this way never came into possession of the money which represented his total tax liability under the Act. This is a feature of the taxing scheme which is of importance in ascertaining the true meaning and intent of Section 24 (e).

It is significant that the Settlement of War Claims

Act of 1918 did not directly or by implication ratify or countenance any payments by the Custodian prior to 1928 for taxes on income or profits of the Aliens with respect to any property which had been seized from them. On the contrary, his several funds were treated as if they had been maintained intact both as to principal, interest, profits, or income—saving only for the payments authorized by the Winslow Bill.

Congress realized that the new taxing scheme devised by it for Alien Property Custodian funds might in its application lead to unintended and inequitable results. For example, in applying the fiction of the supposition that the property had never been seized, the taxpayer who, losing his property when it was seized and having therefore had no income from it nor realizing any profits from the sale of any of his seized property, had naturally made no returns for all the years prior to 1928. This omission on his part to make income tax returns if his property was to be considered as never having been seized, might have made him subject to the payment of so much in interest and penalties as to amount practically to the confiscation of the entire fund. Such a result, however, was far from the mind of Congress and it was therefore provided in Section 24 (e) that in the case of any internal revenue tax imposed (by the operation of the Settlement of War Claims Act of 1928, of course, since there never was any other) no interest or civil penalty should be assessed against the taxpayer. Per contra, should the taxpayer in paying the tax, or rather the Alien Property Custodian, in paying the tax for the taxpayer under the provisions of

Section 24 (b) retain or pay too much and the taxpayer be subsequently found entitled to a credit or refund with respect to such over-payment, such credit or refund should in that instance be without interest. Section 24 (e) expressly limits this interest provision to those cases which arise under "such tax", i.e. the tax which was for the first time established by the Settlement of War Claims Act in 1928.

Refunds by way of restoration to the Alien Property Custodian on payments erroneously made by him or illegally exacted from him on some unsound tax theory, in earlier years, were not dealt with by the Settlement of War Claims Act in any way but were left to the provisions of the General Revenue Acts. The Alien Property Custodian as trustee, aided by the Treasury, was, of course, under the duty of keeping his funds intact both as to principal as well as interest, and the status of his funds was an entirely different matter from the question of how the aliens might ultimately be taxed with respect to these funds when Congress might beneficially allocate them to the aliens. In fact, how could the tax be computed in the first instance under the Settlement of War Claims Act of 1928 until the fund was assembled both as to principal and interest and until moneys unlawfully held or retained by the Treasury had been returned to the Alien Property Custodian's funds under the provisions of the General Revenue Acts?

So Congress deliberately and intentionally left all questions as between the Alien Property Custodian and the Treasury to be governed by the General Revenue

Acts and concerned itself only, in respect of taxes, (as established for the first time in the Settlement of War Claims Act), with those taxes which were imposed by that statute and only with such refunds as might grow out of overpayment or over-retention by the Alien Property Custodian of those taxes for which provision was first made in the Settlement of War Claims Act.

Once the true nature of the Settlement of War Claims Act is understood it becomes wholly clear that Section 24 (e) has application only to the special condition resulting from the imposition of new taxes, computed on a newly established basis, payable for the first time beginning 1928, and has no bearing or relation to any claims which the Custodian in his own right as Alien Property Custodian and pursuant to his duty to maintain the integrity of the funds which he held in trust might have had against another department of the Government for the return of moneys erroneously paid by him or illegally exactd from him . All such matters were to be governed wholly by the provisions of the General Revenue Laws and were in no way touched upon or legislated about in the Settlement of War Claims Act.

Section 24 (e) consequently related wholly and only to taxes which became payable and payable for the first time under Sections 24 (b), (c), and (d), i.e. only to taxes which were payable *in the future*. Section 24 (e) is wholly *prospective* looking to an absence of penalty and interest as to payments which might be due under the scheme of newly imposed taxes and the absence of interest on credits or refunds whenever in

the payment of these newly imposed taxes an over-payment has been made by accident, oversight, or error.

Applying these principles to a specific example, let us suppose that the Alien Property Custodian had, as was the fact in many instances, seized income-producing securities, stocks, bonds, mortgages, etc., and had held these securities until after March 10, 1928, meanwhile or at a later date selling or exchanging them or some of them in connection with some reorganization or for some other reason, all as he had a right to do. He then, in determining the taxes due under the Settlement of War Claims Act, separated the income and profits for the several years preceding 1928 and applied to the income those rates which were applicable for the several years and to the profits the tax rate elected by the alien pursuant to Section 24 (c). Whatever property had been sold or exchanged by the Custodian was made subject under Section 24 (d) to such computations as were pertinent to property which was "compulsory or involuntarily" converted. The Custodian, adding up the total of these taxes thus computed, retained a sufficient amount in securities to cover the taxes thus ascertained. Those retained securities would continue to earn interest until the amount of the taxes was ultimately determined. If the taxpayer should be of the opinion that the computations determining the total tax due under the Settlement of War Claims Act were erroneous or erroneously applied and his claim was found to be justifiable, the real tax as ultimately determined would be paid out of the funds or securities retained for that purpose by the Custodian or the Treasury under Sec-

tion 24 (b) while the balance of the retained securities would be allocated to the alien's interest in the fund by way of credit or refund. On that credit or refund Section 24 (e) says that there should be no interest allowance for one simple reason among others that the amounts thus refunded were, theoretically at least, earning interest during the time that they were withheld.

From the foregoing examination of the purpose, intent, and true meaning of Section 24 (e) it clearly appears that the section applies only to those taxes to which the former alien enemy became subject upon the passage of the Settlement of War Claims Act of 1928 since prior to 1928 the alien enemy was not with respect to the Custodian funds a taxpayer at all within the meaning of that term as defined in the Internal Revenue Acts. Only after their interest in the funds were restored to them, and this was not until 1928, did they have any status which made them liable to the payment of any income or profits taxes. When Section 24 (e) refers to "Internal Revenue Tax imposed" that, of course, means taxes imposed against the beneficial owner and as the former alien enemy became beneficial owner only by virtue of the Act of 1928, the tax referred to in Section 24 (e) could refer to no other tax than the one which was for the first time imposed against the newly created beneficial owners by the Settlement of War Claims Act of 1928. Due to the peculiar manner in which said Act imposed its taxes the payment of such taxes by the newly created beneficial owner, even if the payment was made instantly, was

necessarily late from the standpoint of the Revenue Acts in force during the prior years with respect to which the newly created beneficial owners were about to have their taxes computed under the provisions of the Settlement of War Claims Act. Accordingly Section 24 (e) primarily, as a matter of plain justice, operated to relieve the new taxpayer of any liability for interest or penalties for failure to pay at an earlier date as would have been required by the Revenue Acts. On the other hand, if in the payment of these taxes first imposed on the taxpayer by the 1928 Act there was any overpayment and the overpayment was credited back or refunded, Congress said that there should be no interest on any refund of *those* taxes. In other words, these taxes first imposed by the Settlement of War Claims Act of 1928 were not to bear interest either way. The taxpayer was not to be charged interest for making those tax payments late (from the standpoint of any Revenue Statute) and the taxpayer was not to receive any interest if in paying those taxes he paid too much. This was a fair provision and disposition. It meted out even-handed justice to the taxpayer who, of necessity paying his tax late from the standpoint of the Revenue Acts, nevertheless paid it promptly under the Settlement of War Claims Act of 1928, and as in this respect he was excused from penalties for his unavoidable delay, it was provided that he should not be entitled to receive interest if he should overpay his tax liability as computed under the 1928 Act.

In other words, Section 24 (e) obviously comprehends

only "such taxes" as were determined in accordance with the rules for the first time prescribed on March 10, 1928, and then paid by the former alien enemy out of funds the beneficial possession whereof was allocated to him only after March 10, 1928. As the taxes with which the case at bar is concerned were paid by the Alien Property Custodian and long prior to March 10, 1928 and before there was any Congressional recognition of the petitioner's beneficial interest in the corpus of the fund, Section 24 (e) has no application to this case. The authorities amply support the foregoing position.

Courts uniformly refuse to give statutes a retrospective operation where rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room for doubt that such was the intention of the legislature. *U. S. v. Heth*, 3 Cranch 399; *Murray v. Gibson*, 15 How. 421; *Sohn v. Waterson*, 17 Wall 596.

In *United States v. Magnolia Co.*, 276 U. S. 160, 162, the Supreme Court, construing the interest provisions of the Revenue Acts of 1921 and 1924 said:

"Statutes are not to be given retroactive effect or construed *to change the status of claims fixed* in accordance with earlier provisions unless the legislative purpose so to do plainly appears." (Italics supplied)

It will be kept in paramount mind throughout this consideration that at the time the taxes in question were overpaid by the Alien Property Custodian, on behalf

of this petitioner, to wit, March 15, 1924, the Revenue Act of 1921 was in effect. This Act provided for interest on every refund of every internal revenue tax at 6 per cent. per annum. Moreover, when the now concededly erroneous assessment was made and paid on March 15, 1924, the Custodian had the right either to pay the tax and seek to recover it by proper refund claims, in which event, under the then existing law if he were successful, the refunds would carry 6 per cent. interest, *or*, the Custodian could have contested the assessment prior to payment and thus permitted the money which he used to pay the tax, and which at that time was invested pursuant to law in Liberty Bonds at $4\frac{1}{2}$ per cent. to continue to earn said $4\frac{1}{2}$ per cent. pending settlement of the tax dispute.

Acting in best faith, in his dual capacity as an officer of the Government and as trustee for the fund, he chose to pay the tax and seek its refund with 6 per cent. interest, as then provided by law.

When the Custodian paid the erroneous assessment and filed the refund claims he did all that was required by law of him to entitle him to the refunds *with interest*, provided only that the grounds set forth in the refund claims were sound. That such grounds *were* sound conclusively appears from the fact that the refund claims were subsequently allowed in full and the entire amount of the taxes paid on March 15, 1924 as aforesaid was refunded. The *status* of the refund claims, therefore, became fixed at the time they were so filed. Under the rule of *United States v. Magnolia Co., supra*, Section 24 (e) can have no application here, for there is no word in said Section 24 (e) which conclusively nega-

tives the proposition that its provisions were intended *only* to apply to taxes overpaid *after* its effective date, March 10, 1928.

Every presumption arises in favor of *prospective* construction of a statute. The reason for this rule is obvious. Men, and particularly trustees, have the right confidently to act in accordance with *existing* law, and to fear no injurious consequences to their rights which have become fixed under such existing law. The equity of this rule is likewise apparent. Equities, of course, abound in the instant case in petitioner's favor. And where equity abounds, *responsive law is there*. For the reasons stated, Section 24 (e) has no application to this case.

VI.

UNDER THE INTERPRETATION ADVANCED BY THE RESPONDENTS SECTION 24 (e) OF THE TRADING WITH THE ENEMY ACT, AS AMENDED, IS UNCONSTITUTIONAL AS VIOLATIVE OF THE FIFTH AMENDMENT.

The Fifth Amendment to the Constitution forbids the "taking" by the United States of private property for public use without just compensation. Such just compensation means the full and perfect equivalent of the property taken, that is to say, the value of the property as of the time of the taking plus so much in addition as will produce the full equivalent of that value paid contemporaneously with the taking. *Seaboard Air Line Ry. v. United States*, 261 U. S. 299. Interest at a

proper rate from the time of the taking to the time of the payment is a part of such just compensation. *ibid.*

The foregoing principles are not limited in their applicability to a taking by the Government of private property for public use under its power of eminent domain. The character of the governmental power exercised in the taking is not material. *Chicago, Burlington & Q. Ry. v. Drainage Commission*, 200 U. S. 561. The power exercised may be that of eminent domain, taxation, police, or whatnot. If under *any* power private property is taken for public use, the Government is liable. *Omnia v. United States*, 261 U. S. at 510.

The liability of the Government in such cases does not depend upon the provisions of *any statute*. It finds its genesis in the Constitution itself, and the right of the individual to said just compensation "*cannot be taken away by statute*". *Seaboard Air Line Ry. Co. v. United States*, *supra*.

Now the erroneous collection by the Government from an individual of an Internal Revenue Tax to which he is not liable, and the consequent deposit of the money so collected with its common treasury funds. is so obviously a taking of private property for public use that no citation of supporting authority is necessary. Under the Constitution whenever such a taking occurs, the owner becomes immediately vested with the right to recover the full and perfect equivalent of that which was taken *as of the time of the taking*. The Supreme Court, in the *Seaboard Air Line* case, *supra*, has squarely held that such "full and perfect equivalent" shall include interest on the principal amount taken

from the time of the taking to the time of the repayment. In the same case the Court likewise held that this "right cannot be taken away by statute?"

It follows that Section 24 (e) of the Trading with the Enemy Act, if interpreted as denying interest on all refunds of internal revenue taxes paid by the Custodian prior to 1928, is unconstitutional, null, and void.

VII.

THE TREATY OF FRIENDSHIP ETC. BETWEEN GERMANY AND THE UNITED STATES PRO- CLAIMED OCTOBER 14, 1925, VESTED IN THE PETITIONER THE RIGHT TO THE INTEREST HERE SOUGHT TO BE RECOVERED.

Article VIII of the aforesaid Treaty provides that:

"The nationals and merchandise of each high contracting party within the territories of the other *shall receive the same treatment* as nationals and merchandise of the country *with regard to internal taxes, transit duties* * * *
(Italics supplied)

Treaties, of course, are to be most liberally construed so as to give vital effect to their broad purposes. *Santovincenzo v. Egn*, 284 U. S. 30; 76 L. Ed. 135. When this Treaty is so construed there can be no doubt of its purpose and intent to place upon the same footing both Germans and Americans who are subject to the internal revenue taxes of the United States. It is fair, therefore, to say that from and after October 14, 1925, Germans were entitled to the same benefits and treat-

ment under the internal revenue laws of the United States as were American taxpayers. The refunds here in question were paid on May 15, 1929. Had such refunds been then paid to American taxpayers, clearly they would have carried interest. The aforesaid Treaty, it is respectfully submitted, vested the same right to interest in this petitioner, who admittedly is a German citizen.

VIII.

**SECTION 614 OF THE REVENUE ACT OF 1928
EXPRESSLY AND/OR BY NECESSARY IMPLI-
CATION REPEALED SECTION 24 (e) OF
THE TRADING WITH THE ENEMY ACT,
AS AMENDED TO THE EXTENT TO
WHICH THAT SECTION DENIES IN-
TEREST ON REFUNDS OF INTER-
NAL REVENUE TAXES.**

(a) Section 614 expressly repealed Section 24 (e) to the extent to which that section denies interest on refunds of intrnal revenue taxes.

Prior to the enactment of Section 24 (e) of the Trading with the Enemy Act on March 10, 1928 the sole law upon the subject of interest on refunds of internal revenue taxes then in effect was Section 1116 of the Revenue Act of 1926, *supra*.

Upon the enactment of Section 24 (e), to all intents and purposes it became a component part of Section 1116 of the Revenue Act of 1926, and as to all subsequent occurrences must be considered as though it had originally been enacted as a part of said Section 1116.

U. S. v. La Franco, 282 U. S. 568 clearly supports the foregoing proposition. In this case the Supreme Court considered the effect of Section 35 of the National Prohibition Act upon previous legislation dealing with the same subject and said:

“Section 35 of the act, *in effect*, amended the preceding statutes in the particulars stated; and *as thus amended*, these statutes now are to be read, as to all subsequent occurrences, as if they had originally been in the amended form.”
(citing many cases)

So in the instant case, Section 24 (e) of the Trading with the Enemy Act in effect amended Section 1116 of the Revenue Act of 1926. Section 1116 therefore as to all subsequent occurrences, should be read as if it had originally contained Section 24 (e).

With this state of the law before it Congress enacted Section 614 of the Revenue Act of 1928. Subdivision (c) of Section 614 is as follows:

“Section 1116 of the Revenue Act of 1926 is repealed.”

This express repeal of Section 1116 clearly comprehended Section 24 (e) which, as we have seen, by operation of law had become a component part of Section 1116 at the time of the enactment of the Revenue Act of 1928.

Precisely in point with the position here taken is *State v. Bressie* (Mo. 1924) 262 S. W. 1015, wherein the court said:

“In 36 Cyc 1095, under note 23 it is said:

‘Where an amendment merely enlarges and extends the provisions of the original act, such act retaining its identity, the repeal thereof carries with it the amendment. *Ellison v. Jackson Water Co.* 12 Cal. 542; *Blake v. Brackett*, 47 Me. 28; *Welstead v. Jennings*, 104 N. Y. App. Div. 179 (Aff’d. 185 N.Y. 588); *In re Ward* 31 N.Y. Supp. 49; 10 Misc. (N. Y.) 424.”

“Such was the holding * * * in *Kam-erick v. Castleman*, 21 Mo. App. 587, (quoting)
* * *

“The fact that the two acts were passed at the same session of the general assembly makes no difference. *The effect of the Act repealing the original section is the same as if the repealing act had occurred at a subsequent session of the General Assembly.*” (Italics supplied)

Respectfully we ask if it is possible to find a decision more squarely in point than the foregoing. When the Revenue Act of 1928 expressly repealed Section 1116 of the Revenue Act of 1926 in the language of *State v. Brassie*, supra, such repeal carried the amendment, Section 24 (e) of the Trading with the Enemy Act, amended, with it.

The respondents’ defense under Section 24 (e) is thus wholly without support.

(b) *Section 614 impliedly repealed Section 24 (e) to the extent to which that section denies interest on refunds of internal revenue taxes.*

Not only did the Revenue Act of 1928 expressly repeal the provisions of Section 24 (e) as herein next above

shown, but it likewise repealed said section by *necessary implication*.

It is fundamental that where two Congressional acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, must govern, although it contains no repealing clause. Innumerable cases could be cited in support of this principle. A few, however, will suffice.

In *Henrietta Min. etc. Co. v. Gardner*, 173 U. S. 123, the Court said:

“Statutes are indeed sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. *This is always the rule* when the provisions of the latter acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing *manifests a clear intent to abolish* the old laws.”
(Italics supplied)

In the early and leading case, *McCulloch v. Maryland*, 4 Wheat, 316, the Court held:

“A law absolutely repugnant to another, as entirely *repeals that other as if express terms of repeal (*426) were used.”

And in the rather recent case, *United States v. Yuginovich*, 256 U. S. 450, the Court held:

“A later statute repeals former ones when clearly inconsistent with the earlier enactment.”
(p. 463)

The Revenue Act of 1928 was passed on May 28,

1928, subsequent to the Act of March 10, 1928, which wrote Section 24 (e) into the existing law regulating the allowance of interest on refunds of internal revenue taxes. Section 614 of the Revenue Act of 1928 is in violent and direct conflict with Section 24 (e) of the Act of March 10, 1928 to the extent to which that section denies interest on refunds of internal revenue taxes. Section 614 in mandatory terms directs the payment of 6 per cent. interest on "*any*" refund of "*any internal revenue tax*" after June 28, 1928, whereas Section 24 (e) in equally mandatory language prohibits the payment of any interest on credits or refunds of internal revenue taxes paid under the Settlement of War Claims Act and made in respect of property seized by the Alien Property Custodian. It is difficult to imagine a sharper, more direct, or more clear-cut conflict between two statutes. In such instances, as the Supreme Court has repeatedly said, the latter statute must govern.

A very apt expression from the court in this regard appears in *United States v. Tynen*, 11 Wall. 89, 92, wherein the court announced the rule of implied repeals as follows:

"When there are two acts on the same subject the rule is to give effect to both if possible. But if the two *are repugnant in any of their provisions*, the latter act, without any repealing clause operates, to the extent of the repugnancy, as a repeal of the first." (Italics supplied)

Applying this well settled rule, the Supreme Court in *United States v. Yuginovich*, 256 U. S. 450, held that

the Revenue laws pertaining to liquor fell before the later Prohibition Act though not expressly repealed thereby, and in a very recent case, *Callahan v. United States*, 285 U. S. 515, strikingly similar, in legal aspect, to the situation here under consideration, the court said:

“The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation, and provides a penalty therefor; whereas the Tariff Act is concerned with a wholly separate subject and the penal section 593 (b) aimed at unlawful importation should not be construed as repealing the earlier special statute. (Cases)—The Tariff Act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section at the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same subject. *Cook County National Bank v. U. S.*, 107 U.S. 445; *Walla Walla v. Walla Water Co.*, 172 U. S. 1, 22.”

The *Callahan* case, *supra*, is so strongly in point, and so thoroughly supports the position here taken, that the petitioner's case might well be rested here. There are other considerations, principals, and authorities, however, which force beyond peradventure the conclusion that Section 24 (e), to the extent to which that section denies interest on refunds of internal revenue taxes, was impliedly repealed by Section 614. A few of such follow:

It is fundamental and well settled that if the latest statute upon a given subject clearly intends to prescribe *the only rule* which shall govern that subject it

repeals by implication all prior legislation thereon. *Daviess v. Fairbairn*, 3 How. 636; *U. S. v. Claflin*, 97 U. S., 546; *Cook County National Bank v. U. S.*, 107 U.S. 445; *Tracy v. Tuffly*, 134 U. S. 206; *The Paquete Habana*, 175 U.S. 677.

The principle is thus stated in *Lewis' Sutherland, Statutory Construction*, 2d Ed. 472:

“When it (an affirmative statute) prescribes an exclusive rule it implies a negative, and repeals whatever of existing law stands in the way of its operation.” Citing *Gassenheimer v. D. C.* 6 App. Cas. 108.

United States v. Rider, 163 U. S. 132, 140 pointedly applies this doctrine. In holding that the later of two acts respecting appellate jurisdiction prevailed over the prior act because it evidenced the Congressional intent to prescribe the sole rule upon the subject, the Court said:

“It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the act of March 3, 1891, covers the whole subject matter under consideration and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.”

Section 614 of the Revenue Act of 1928 “tested by its scope, * * * and its terms” clearly “covers the whole subject matter under consideration”, namely interest on refunds of internal revenue taxes. By its plain words this section is applicable to “any refund” of “any

internal revenue tax" made after its effective date.

We establish infra, under Point IX of this brief the clear intent of Congress, as expressed in Section 614 of the Revenue Act of 1928, to prescribe the sole rule governing interest on refunds of Internal Revenue taxes paid after June 28, 1928. It follows, under the authorities next above cited, that all other legislation on the subject was thereby repealed.

In further support of the implied repeal here contended for we invoke the rule recognized and applied in *Continental Ins. Co. v. Simpson*, 8 F. (2d) (CCA) 439, 442, wherein the Court said:

"The rule is well established, and the reason for it plain, that the first amendment of a statute is repealed when the statute referred to is again amended and wholly reenacted with the omission of the first amendment. Note 88 Am. St. R. 281."

As set forth above, Section 1116 of the Revenue Act of 1926 was the sole law governing interest on tax refunds current at the time of the enactment of Section 24(e). The latter section in effect amended said Section 1116 with respect to interest on refunds. Section 614 of the Revenue Act of 1928 subsequently expressly repealed Section 1116 of the 1926 Act, and substantially reenacted it with the omission of the pertinent part of Section 24(e), its first and only amendment. By this token, likewise, Section 24(e) was repealed in so far as it may have purported to deal with interest on refunds.

The foregoing considered in the light of the fact that

said Section 24(e) constitutes the respondents' only defense to the petition herein, it follows that the prayer of said petition should have been granted.

IX.

SECTION 614 OF THE REVENUE ACT OF 1928 PRESCRIBES THE SOLE AND EXCLUSIVE RULE GOVERNING INTEREST ON EVERY REFUND OF ANY INTERNAL REVENUE TAX AFTER JUNE 28, 1928.

What has been said under Points III and VIII, *supra*, would seem also to establish the proposition contended for under this point. But the purpose of Section 614 to furnish the exclusive rule in respect of interest on refunds of internal revenue taxes appears *in even bolder relief* when the history of the legislation upon this subject is considered. That history is short, clear, and easily ascertained.

The first express recognition by Congress of the duty of the United States to make a taxpayer "whole" by paying interest on refunds of taxes erroneously collected (in substance and effect there thus having been a "taking" of private property for public use) appeared in the Revenue Act of 1921. Section 1324 of the Revenue Act of 1921 provides as follows:

Section 1324.

"(a) That upon the allowance of a claim for the refund of or credit for internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum. per month to

the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The Revenue Act of 1924 expressly repealed the foregoing and provided in its place Section 1019 thereof as follows:

Section 1019.

"Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term of 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

The Revenue Act of 1926 in turn repealed Section 1019 of the 1924 Act and provided in its stead Section 1116, as follows:

Section 1116.

“Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.

(b) As used in this section—

(1) The term ‘additional assessment’ means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency under Title II or Title III of the Revenue Act of 1924 or of this Act;

(2) The term ‘date of the allowance of the refund’ means in the case of any income, war-profits, or excess-profits tax, the first date on which the Commissioner signs the schedule of overassessments in respect thereof.

(c) This section shall be applicable to any refund paid, and to any credit taken, on or after

the date of the enactment of this Act, even though such refund or credit was allowed prior to such date."

The only other legislation upon this subject prior to the Revenue Act of 1928 was Section 24(e) of the Trading with the Enemy Act, approved March 10, 1928, which in effect amended Section 1116 of the Revenue Act of 1926 so as to exclude interest on refunds of such taxes as became payable for former alien enemies under the Settlement of War Claims Act of 1928 with respect to property which had been seized by the Alien Property Custodian.

In the meantime numerous questions had been raised and presented to the Treasury and the courts under each of the foregoing acts. In the first place there was the question as to which act was applicable when the taxes had been collected under the provisions of one act and refunded during the currency of the other. *Magnolia Petroleum Co. v. United States*, 276 U.S. 160. Then there was the question as to when and how a refund was "allowed" within the meaning of that term as used in said acts. *Girard Trust Company v. United States*, 270 U.S. 163; *Blair v. Birkenstock*, 271 U.S. 348.

Seeking to clarify the whole subject of interest on refunds by prescribing a plain, simple, unambiguous rule applicable to all refunds thereafter to be *paid*, Congress, in the Revenue Act of 1928 expressly repealed Section 1116 of the 1926 Act (which had at that time been amended by Section 24(e) and provided *without exception* by Section 614 that *any* refund of *any* internal

revenue tax, no matter when allowed, if *paid* after June 29, 1928 should bear interest from the date of the overpayment to a date not more than thirty days prior to the date of the refund check. Its purpose was obviously to prescribe the exclusive rule with respect to interest on all refunds.

X.

CONCLUSION.

In conclusion, it is respectfully submitted that the admitted facts herein present a case squarely within the provisions of Section 614 of the Revenue Act of 1928 and that judgment of the lower Court should be reversed accordingly with directions that the prayer of the petition be granted.

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FEB 1 5 1933

No. 5888

Henry W. Hodges

CLERK

**In the Court of Appeals of the District of
Columbia**

**UNITED STATES EX REL. I. G. FARBENINDUSTRIE
AKTIENGESELLSCHAFT, APPELLANT**

v.

**DAVID BURNET, COMMISSIONER OF INTERNAL REV-
ENUE, OGDEN L. MILLS, SECRETARY OF THE
TREASURY, WALTER O. WOODS, TREASURER OF
THE UNITED STATES, AND HOWARD SUTHERLAND,
ALIEN PROPERTY CUSTODIAN, APPELLEES**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA**

BRIEF FOR THE APPELLEES

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26 Feb 1933

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**In the Court of Appeals of the District of
Columbia**

No. 5888

UNITED STATES EX REL. I. G. FARBENINDUSTRIE
Aktiengesellschaft, appellant

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REV-
enue; Ogden L. Mills, Secretary of the Treasury;
Walter O. Woods, Treasurer of the United States;
and Howard Sutherland, as Alien Property Cus-
todian, appellees

*APPEAL FROM THE SUPREME COURT OF THE DISTRICT
OF COLUMBIA*

BRIEF FOR THE APPELLEES

STATEMENT

This is an appeal from a judgment of the Supreme Court of the District of Columbia entered on January 17, 1933, overruling the demurrer of the appellant (hereinafter referred to as the "relator") to the answer of the appellees (hereinafter referred to as the "respondents"), dismissing the relator's petition for writ of mandamus and discharging the rule to show cause issued thereon. (R. 17.)

The relator is a German corporation and is the legal successor to another German corporation whose property, located within the United States, was seized by the Alien Property Custodian during the recent war between the United States and Germany. (R. 2.) In March, 1924, Internal Revenue taxes in the amount of \$3,262,268.91 were assessed by the Bureau of Internal Revenue and imposed against the relator's property in the hands of the Alien Property Custodian, and on March 15, 1924, the Custodian in good faith paid the amount of said assessment to the Collector of Internal Revenue at Baltimore, Maryland, out of the seized property of the relator. (R. 3-4, 10, 18.) Subsequently, the Alien Property Custodian filed a claim with the Bureau of Internal Revenue for the refund of said taxes, and thereafter on May 15, 1929, the Bureau of Internal Revenue refunded and paid to the Custodian the full amount of said taxes, viz, \$3,262,268.91. (R. 4, 10.) The Custodian thereupon restored said sum to the credit of Trust No. 6781 in his office. (R. 4, 10.) The Custodian has never filed a claim or demand for interest upon said refund.

The relator has demanded of the respondent, the Commissioner of Internal Revenue, that he compute, authorize, allow and direct payment to the Alien Property Custodian of interest upon said refund at the rate of 6 per cent per annum from March 15, 1924, the date of the payment of the tax, to a date not more than 30 days prior to the date of said refund. A similar demand has been made by the relator upon

the Secretary of the Treasury, both of which have been refused. (R. 11.) The total amount of interest which the relator seeks to recover in this case appears to be \$994,992.01.

The relator contends that under Section 614 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 876, interest as above-described should be paid to the Alien Property Custodian. The relator prayed for a writ of mandamus directing the Commissioner and/or the Secretary of the Treasury and the Treasurer of the United States to compute and allow said interest and to authorize and direct the proper disbursing officer to pay the same to the Alien Property Custodian for the account of the relator. (R. 6.)

The respondents by paragraph 15 of their answer to the petition for writ of mandamus and the rule to show cause said (R. 11):

* * * that said relator is a German corporation and an enemy of the United States within the meaning of the Act of Congress known and described as the 'Trading with the Enemy Act,' approved October 6, 1917 (c. 106, 40 Stat. 411), as amended, and is the successor to Farbenfabriken vormals Fr. Bayer & Company, a German corporation, which likewise was and is an enemy of the United States within the meaning of said Trading with the Enemy Act, and that under Section 24 (e) of the Trading with the Enemy Act, as amended by the 'Settlement of War Claims Act of 1928', approved March 10, 1928 (c. 167, 45 Stat. 254, 276), the taxpayer is precluded and barred

from being credited or paid any interest or income whatsoever on the aforesaid refunded taxes.

This defense goes to the roots of the main question involved in this case.

The respondents by their answer further alleged that Section 24 (e) of the Trading with the Enemy Act was in full force and effect when the aforesaid taxes were refunded to the Alien Property Custodian; that there was no mandatory duty on the part of the respondents, or any one of them, to compute, authorize, allow or pay said interest; that such computation, allowance, authorization and payment of such interest was not a ministerial act required of them by law; and that the Supreme Court of the District of Columbia was without jurisdiction to compel the respondents, or any of them, by writ of mandamus to pay any interest to the taxpayer on internal-revenue taxes refunded to the Alien Property Custodian. (R. 11-12.)

After a hearing upon the relator's demurrer to the answer of the respondents the Court held that said demurrer should be overruled, and, the relator having elected to stand upon said demurrer, the Court entered a judgment overruling the demurrer, discharging the rule to show cause, and dismissing the petition. (R. 17.) From that judgment the relator has prosecuted the present appeal to this Court.

QUESTION INVOLVED

The question involved in this case may be summarized as follows:

When the Alien Property Custodian, during the period of the recent war, seized the property of a German corporation, and paid out of such property a tax imposed thereon by the Bureau of Internal Revenue, and the amount of such tax was subsequently refunded by the Commissioner of Internal Revenue to the Custodian, (1) is said German corporation entitled to the payment of interest on such refunded taxes, and if so, (2) may the Supreme Court of the District of Columbia, upon application of said German corporation, issue a writ of mandamus compelling the Commissioner of Internal Revenue and/or the Secretary of the Treasury and the Treasurer of the United States to compute, authorize, allow and direct payment of interest upon such refunded taxes to the Alien Property Custodian for the account of the relator?

STATUTES

The respondents contend that the payment of interest upon internal revenue taxes refunded to the Alien Property Custodian in respect of seized enemy property is prohibited by Section 24 (e) of the Trading with the Enemy Act (enacted by Section 18 of the Settlement of War Claims Act, approved March 10, 1928), c. 167, 45 Stat. 254, 276, which reads as follows:

In case of any internal-revenue tax imposed in respect of property conveyed, transferred,

assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

The relator contends that the writ of mandamus should be issued directing the payment of the interest in question because of Section 614 of the general Revenue Act of 1928, approved May 29, 1928, c. 852, 45 Stat. 791, 876, which reads as follows:

(a) Interest shall be allowed and paid upon any overpayment in respect of any internal-revenue tax, at the rate of 6 per centum per annum as follows:

(1) In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921 or any subsequent revenue Act, then to the date of the assessment of that amount.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than 30 days, such date to be determined by the Commissioner.

(b) As used in this section the term "additional" assessment means a further assessment for a tax of the same character previously paid in part, and includes the assessment of a deficiency of any income or estate tax imposed by the Revenue Act of 1924 or by any subsequent revenue Act.

(c) Section 1116 of the Revenue Act of 1926 is repealed.

(d) Subsections (a), (b), and (c) shall take effect on the expiration of thirty days after the enactment of this Act, and shall be applicable to any credit taken or refund paid after the expiration of such period, even though allowed prior thereto.

The above statutes were enacted by the same Congress at the same session.

ARGUMENT

I

The Supreme Court of the District of Columbia was without jurisdiction to grant the writ of mandamus prayed for in the relator's petition

The petition alleged that the relator was a German corporation with its office and principal place of business in Germany and that said relator had succeeded to the rights of another German corporation whose property was seized by the Alien Property Custodian and out of which property the tax in question was paid by the Custodian. (R. 2.) The relator, therefore, concededly has only such rights as its predecessor would have were it now seeking to recover the interest here claimed. Furthermore, the answer alleged as a fact

that the relator is an enemy of the United States under the Trading with the Enemy Act, and that its predecessor was and is an enemy under said Act. (R. 11.) The demurrer, consequently, conceded that the relator's property was rightfully seized and that the relator and its predecessor are enemies of the United States within the meaning of the Trading with the Enemy Act. An enemy whose property was rightfully seized by the Custodian continues to remain an enemy within the meaning of the Trading with the Enemy Act with respect to his sequestered property so long as said property or any part thereof is retained by the Government and only has such right with respect to said property or interest thereon as Congress as a matter of grace may grant to such enemy.

In the case of *Swiss National Insurance Co. v. Miller*, 267 U. S. 42, the plaintiff, a Swiss corporation, was an enemy by reason of doing business in Germany during the war, and its property in the United States was seized by the Custodian during said war. After the end of the war the plaintiff filed suit in the Supreme Court of the District of Columbia to recover its seized property alleging that it had ceased to do business in Germany and that the war having ended on July 2, 1921, it, as a corporation of a neutral nation, was entitled to recover its property, neutral citizens who were non-enemies being entitled to recover their seized property (c. 241, 41 Stat. 977), and the court sustained a motion to dismiss the bill. The decision was affirmed by this Court. *Swiss National Insurance Co. v. Miller*, 53 App. D. C. 173,

289 Fed. 571. The Supreme Court affirmed these decisions in an opinion by Chief Justice Taft who said (pp. 44-45):

The first contention, that because the company had ceased to do business in Germany after the seizure the Alien Property Custodian lost his right to continue to hold the property, cannot be sustained. A change like this could not take away the status of the seized property as enemy property. The withdrawal from business in Germany might well involve a transfer of something of value from the plaintiff to enemy citizens or subjects and strengthen the enemy resources.

Second, it is argued that as the War ended by Joint Resolution of July 2, 1921, 42 Stat. 105, the plaintiff thereby ceased to be an enemy and was entitled to a return of its property without express legislation giving such a right. It is clear from Section 12 of the Trading with the Enemy Act, 40 Stat. 411, 424, that Congress did not intend that such a right should exist. One clause of that section provides:

"After the end of the War any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct."

The argument for the appellant is that when the War ended, it ceased to be an enemy and so the words quoted do not apply to it. This is an impossible construction of the section.

After the end of the War, there could be no enemy in the sense in which the appellant argues. The word "enemy" used in Section 12 of course refers to the person who or corporation which fulfilled the definition of an enemy during the war. *It follows that the right of the appellant to recover its property must depend on the Congressional direction subsequent to the original Act.* (Italics ours.)

Upon the seizure of the relator's property by the Alien Property Custodian during the recent war the relator's title thereto became completely divested, and every right, title and interest therein thereupon became vested in the Custodian. *United States v. Chemical Foundation*, 272 U. S. 1; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F. (2d) 742; *Hicks v. Anchor Packing Co.*, 16 F. (2) 723; *Garvan v. Marconi Wireless Telegraph Co.*, 275 Fed. 486; *Kohn v. Kohn*, 264 Fed. 253; *Junkers v. Chemical Foundation*, 287 Fed. 597; *Isenberg v. Sherman*, 212 Calif. 454 (Petition for rehearing denied, 212 Calif. 507); certiorari denied, 286 U. S. 547.

The Supreme Court has recognized that under the Amendment to the Trading with the Enemy Act of November 4, 1918 (c. 201, 40 Stat. 1020), all property seized by the Alien Property Custodian should be administered by him, and that by the Amendment of March 28, 1918 (c. 28, 40 Stat. 459), which provides that the Alien Property Custodian shall be "vested with all of the powers of a common-law

trustee in respect of all property" seized by him, he is given the power to "manage the same as though he were the absolute owner thereof." *Central Trust Co. v. Garvan*, 254 U. S. 554.

The position of the Alien Property Custodian with respect to sequestered property was very accurately described by Judge Augustus N. Hand of the United States District Court for the Southern District of New York (now Circuit Judge of the U. S. Circuit Court of Appeals for the 2nd Circuit) in the case of *Junkers v. Chemical Foundation*, *supra*, where he said (p. 598):

While the Alien Property Custodian is a common-law trustee, he holds the property not in the interest of the former owner, but in the public interest.

In the case of *Hicks v. Anchor Packing Co.*, *supra* (p. 727), the United States Circuit Court of Appeals for the 3rd Circuit expressly held that the Alien Property Custodian was vested with the legal title to enemy property seized by him under the Trading with the Enemy Act. And in *Isenberg v. Sherman*, *supra*, the Supreme Court of California said (p. 501), "Once the property was seized, the Custodian exercised rights of absolute ownership over it."

Therefore, when the relator's property was seized the legal title thereto became vested in the Alien Property Custodian as a trustee for the United States in the public interest.

The power of disposing of enemy-owned property seized by the Custodian was vested exclusively in

Congress. *United States v. Chemical Foundation*, 272 U. S. 1; *Brown v. United States*, 8 Cranch 110; *Miller v. United States*, 11 Wall. 268.

A claim for the recovery of money or other property seized by the Alien Property Custodian is in effect a claim against the United States (*Banco Mexicano v. Deutsche Bank et al.*, 53 App. D. C. 266, 271, 289 Fed. 924, 929, affirmed in *Banco Mexicano v. Deutsche Bank*, 263 U. S. 591, 602; *von Bruning v. Sutherland*, 58 App. D. C., 258, 29 F. (2d) 631), and can be satisfied only on such terms as Congress as a matter of grace may grant to the claimant (*Synthetic Patents Co. v. Sutherland*, 22 F. (2d) 491; *Springer v. Garvan*, 276 Fed. 595; *Kogler v. Miller*, 288 Fed. 806; *Sutherland v. Norris*, 24 F. (2d) 414). As stated in *White v. Mechanics Securities Corporation*, 269 U. S. 283, 301, "The United States seized the property in question from an enemy and of course could do with it what it liked."

Congress by the amendment to the Trading with the Enemy Act of November 4, 1918 (c. 201, 40 Stat. 1020, 1021), which is still in force and effect, provided that—

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the

Alien Property Custodian shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

Section 9 (f) of the Trading with the Enemy Act, as amended on March 4, 1923 (c. 285, 42 Stat. 1511, 1514), which is also still in full force and effect, provides that—

Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

The Supreme Court has held that the sole relief and remedy of a claimant seeking the recovery of property seized by the Alien Property Custodian is that provided by the terms of Section 9 of the Trading with the Enemy Act. *Central Trust Co. v. Garvan*, 254 U. S. 554, 568; *Stoehr v. Wallace*, 255 U. S. 239, 243.

Section 9 (a) of the Trading with the Enemy Act (c. 285; 42 Stat. 1511) provides “That any person * * * claiming any interest, right, or title in any money or other property” seized by the Alien Property Custodian “may file * * * a notice of his claim under oath * * *; and the President * * * may order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer * * * or of the interest therein to which the

President shall determine said claimant is entitled"; and then provides that if the President shall not so order the return of the property so claimed "said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment * * * to said claimant of the money or other property so held * * * or the interest therein to which the court shall determine said claimant is entitled."

The first remedial legislation that Congress enacted after the war for the benefit of German nationals was the Amendment of March 4, 1923 (c. 285, 42 Stat. 1511), known as the Winslow Act, which authorized the return of \$10,000.00 of the seized principal of an enemy national and income in an amount not exceeding \$10,000.00 per annum. The Settlement of War Claims Act, approved March 10, 1928 (c. 167 45 Stat. 254), amended Section 9 of the Trading with the Enemy Act by providing that 80 per cent of the balance of the principal of a German national, after the return of \$10,000.00 under the Winslow Act, together with all income which has accrued on the principal after March 4, 1923, might be returned to such enemy after the payment of taxes, administrative expenses, etc., the remaining 20 per cent. of the principal being retained and invested by the Alien Property Custodian as provided by said Settlement of War Claims Act, such 20 per cent. in fact being used by the United States in the payment of

the awards of the Mixed Claims Commission (United States and Germany) in favor of American claimants against the German Government.

The act of July 1, 1918, 40 Stat. 645, provides that—

All taxes heretofore or hereafter lawfully assessed by any body politic against money or other property held by the Alien Property Custodian shall be paid out of such money or other property, and if that be insufficient, shall be charged thereto and paid out of any other moneys or properties required from the same enemy or ally of enemy.

Section 24 (a) of the Trading with the Enemy Act, enacted by the Amendment of March 4, 1923 (c. 285, 42 Stat. 1516), which is still in force, provides that—

The Alien Property Custodian is authorized to pay all taxes (including special assessments) heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depositary for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering the same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other

money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act.

The Settlement of War Claims Act, which provided for the return of 80 per cent of the principal of German nationals, together with such income as has accrued on the principal since March 4, 1923, added Section 24 (e) to the Trading with the Enemy Act (c. 167, 45 Stat. 254, 276), which reads as follows:

In case of any internal-revenue tax imposed in respect of property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or seized by him, and imposed in respect of any period (in the taxable year 1917 or any succeeding taxable year) during which such property was held by him or by the Treasurer of the United States, no interest or civil penalty shall be assessed upon, collected from, or paid by or on behalf of, the taxpayer; nor shall any interest be credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax.

The above subsection is unique in its provisions in that by the first part thereof it relieves the taxpayer from any interest or civil penalty which might be assessed or collected under the revenue laws or other statutes of the United States, and by the second part thereof it provides that no interest shall be credited or paid to the taxpayer upon any refund of internal revenue taxes. Obviously, it was the purpose of

Congress that one portion of this subsection should balance as against the other. The Settlement of War Claims Act is entitled "*An Act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian.*" Therefore, when Congress passed the Settlement of War Claims Act, which is a special statute providing for the ultimate return of all property of German citizens, it inserted therein the condition contained in Section 24 (e) thereof that no interest should be "credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax."

Since the Alien Property Custodian is a common-law trustee of all property seized by him, and is vested with the legal title to such property as a trustee for the United States in the public interest, and as Congress has specifically directed by Section 24 (a), which was enacted long before the tax here involved was paid, that the Custodian was authorized to pay taxes, and as it appears affirmatively from the petition and the answer that the Custodian actually paid the tax imposed against the relator's seized property, it seems clear that the Custodian was the taxpayer within the meaning of Section 24 (e) of the Trading with the Enemy Act. The Custodian has made no claim or demand for the computation, allowance or payment of any interest upon the taxes

here in question. The relator is proceeding upon the theory that it was the taxpayer and that it, therefore, may recover interest by writ of mandamus. A review of the decisions hereinbefore cited and of Sections 24 (a) and 24 (e) clearly shows that the Alien Property Custodian was the taxpayer. Congress has not authorized German citizens to proceed by mandamus for the recovery of their seized property or interest thereon, and has not given this Court jurisdiction to entertain such an action. Congress has limited the right of a German national in seeking the recovery of his seized property or interest thereon to a suit in equity. As stated in *Synthetic Patents Co. v. Sutherland*, 22 F. (2d) 491, 494, "The right to recover is limited to conditions laid down in Section 9."

Section 9 of the Trading with the Enemy Act, therefore, is the statute which created such rights as a German enemy national has with respect to his seized property and interest thereon, and it provides the special remedy of a suit in equity if his claim is not allowed. In *United States v. Babcock*, 250 U. S. 328, 331, the Supreme Court held that "Where a statute creates a right and provides a special remedy, that remedy is exclusive."

In *Sigg-Fehr v. White*, 52 App. D. C. 215, 220, 285 Fed. 949, 954, which was a suit against the Alien Property Custodian and the Treasurer, this Court said:

In other words, the government has permitted itself to be sued only to the extent limited by the act. To extend this proceeding

to embrace additional causes of action would amount to subjecting the sovereign to a suit in which it has not been made a party, and over which the court has not been accorded jurisdiction.

Section 24 (a) of the Trading with the Enemy Act which authorizes the Alien Property Custodian to pay taxes from enemy property also authorizes the Custodian to deduct administrative charges from such property. In the case of *U. S. ex rel. Goldschmidt v. Sutherland*, 60 App. D. C., 279, 51 F. (2d) 607, the petitioner, a German enemy national, as here, filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the Alien Property Custodian to pay to him the amount of 2 per cent, deducted from his property for administrative expenses. The court dismissed the petition, and this court affirmed that decision holding that the petitioner was restricted from proceeding for the recovery of said 2 per cent "in any other manner or form of action than that expressly provided in Section 9 (a)" of the Trading with the Enemy Act, which does not authorize a writ of mandamus.

In view of the fact that Congress reserved to itself the exclusive power to dispose of enemy property, and as it has made a final disposition of such property by the Settlement of War Claims Act, which contains the specific condition therein [Section 24 (e)] that no interest shall be credited or paid to the taxpayer upon any refund of taxes paid by the Alien Property Custodian from enemy property, it is clear (1) that the

relator is not "the taxpayer," and, consequently, has no right to obtain a writ of mandamus compelling the computation, allowance or payment of any interest upon taxes paid by the Custodian, and (2) that the computation, allowance, and payment of interest upon taxes refunded to the Alien Property Custodian is absolutely prohibited and barred by Section 24 (e) of the Trading with the Enemy Act.

Congress by Section 12 of the Trading with the Enemy Act (c. 106, 40 Stat. 424) set aside enemy property seized by the Alien Property Custodian as a special subject with respect to which it would legislate after the end of the war, and it has provided that the sole relief and remedy of an enemy national with respect to his seized property or interest thereon would be such legislation as it should make with respect to the matter. Congress by the Settlement of War Claims Act has expressed its final determination with respect to such seized property and it has specifically provided that no interest shall be "credited or paid to the taxpayer in respect of any credit or refund" of internal-revenue taxes paid out of property seized by the Custodian. In other words, as stated by the Supreme Court in *White v. Mechanics Securities Corporation*, 269 U. S. 283, 300, "*The funds were seized adversely by the United States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter.*"

See also *Orenstein & Koppel Aktiengesellschaft v. Koppel Industrial Car & Equipment Co.*, 59 App.

D. C. 221, 223, 38 F. (2d) 532, 534; *Sprunt et al. v. Direction der Disconto Gesellschaft*, Case No. 5579, decided by this Court on January 3, 1933.

II

Section 24 (e) of the Trading with the Enemy Act, which bars any credit or payment of interest on taxes refunded to the Alien Property Custodian, was not repealed by section 614 of the Revenue Act of 1928

As hereinbefore pointed out in the argument under the first point of this brief, the property of German enemy nationals seized by the Alien Property Custodian was, by the expressed will of Congress, set aside as a special subject to be dealt with exclusively by Congress after the end of the war.

With respect to the matter of taxation of enemy property, Section 24 (a) of the Trading with the Enemy Act, which authorizes the Alien Property Custodian "to pay all taxes * * * lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act" (i. e., the Trading with the Enemy Act), and Section 24 (e) of said Act, which specifically provides that no interest shall be "credited or paid to the taxpayer in respect of any credit or refund allowed or made in respect of such tax" is the final expression of the will of Congress on that particular subject. Section 24 (e) is a particular or special statute and has application only to the property of alien enemies. Section 24 (e) was enacted by Congress under its war powers. As stated by the

Supreme Court in *Stoehr v. Wallace*, 255 U. S. 239, 241-242:

The Trading with the Enemy Act, whether taken as originally enacted, October 6, 1917, c. 106, 40 Stat. 411, or as since amended, * * * is strictly a war measure and finds its sanction in the constitutional provision, Art. I, Section 8, cl. 11, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Section 614 of the Revenue Act of 1928, is a general revenue statute having application to all classes of property not exempted from its operations by other Acts of Congress. That statute, therefore, is not a special statute enacted under the war powers of Congress, but is a general statute enacted pursuant to Art. I, Section 8, cl. 1, of the Constitution which empowers Congress "To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and the 16th amendment to the Constitution, which empowers Congress "to lay and collect taxes on incomes, from whatever source derived."

From the foregoing it is obvious that Section 24 (e) of the Trading with the Enemy Act and Section 614 of the Revenue Act of 1928 are not inconsistent for the reasons that they find their sanction in, and were enacted by Congress pursuant to, different provisions of the Constitution, and they do not relate to the same class of property.

The relator argues that Section 24 (e) of the Trading with the Enemy Act "to all intents and purposes * * * became a component part of Section 1116 of the Revenue Act of 1926," and that the Revenue Act of 1928 expressly repealed Section 1116 of the Revenue Act of 1926, and thereby impliedly repealed Section 24 (e) of the Trading with the Enemy Act. As hereinbefore shown, this theory of statutory construction is unsound for the reason that Section 24 (e) is a special statute relating to a particular subject matter, and was enacted by Congress under its war powers. It is true that Section 24 (e) modified the Revenue Act of 1926, in so far as that Act may have affected the taxation of property seized by the Alien Property Custodian, but Section 24 (e) did not become a component part of the Revenue Act of 1926. Section 24 (e) of the Trading with the Enemy Act, Section 1116 of the Revenue Act of 1926, and Section 614 of the Revenue Act of 1928, must be expounded by reference to each other so that Section 24 (e) of the Trading with the Enemy Act, and Section 614 of the Revenue Act of 1928, shall avail and have the effect contemplated by Congress.

It is a general rule that in the construction of a statute the intention of the lawmakers is to be deduced from the whole statute and every material part of the same. *Kohlsaat v. Murphy*, 96 U. S. 153; *Pennington v. Coxe*, 2 Cranch, 34; *Neal v. Clark*, 95 U. S. 704. It is a well-established principle of statutory construction that every section and provision of a statute must be given effect if possible. The Su-

preme Court has long held such to be the proper rule of statutory construction. In *Peck v. Jenness*, 7 How. 612, at p. 622, the Supreme Court said:

But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

The relator in its brief refers to the case of *United States v. La Franca*, 282 U. S. 568, as supporting the proposition that Section 24 (e) of the Trading with the Enemy Act, by implication, was repealed by Section 614 of the Revenue Act of 1928. In that case the Court was considering the effect of Section 35 of the National Prohibition Act upon previous legislation dealing with the same subject, which is not the fact in the instant case. All of the cases to which the relator refers deal with cases involving the same subject matter, and no court has held that Congress had before it the same subject matter when it passed Section 24 (e) of the Trading with the Enemy Act as it had before it when it passed the Revenue Act of 1928. The Trading with the Enemy

Act deals exclusively with property and claims for property seized by the Alien Property Custodian, while the Revenue Act of 1928 deals exclusively with the general revenues for the support and maintenance of the Government of the United States.

The law does not favor the repeal of an older statute by a later one by mere implication. *Winslow v. Mortin*, 118 N. C. 486, 491, 24 S. E. 417. Repeals by implication are not favored. *Morris v. Hitchcock*, 21 App. D. C. 565, 591; *McCarthy v. McCarthy*, 20 App. D. C. 195, 202. One statute is not repugnant to another unless they relate to the same subject and are enacted for the same purpose. *People v. Burtleson*, 14 Utah 258, 262, 47 Pac. 87.

It is obvious that the Settlement of War Claims Act, approved March 10, 1928, and the Revenue Act of 1928, approved May 29, 1928, are not *in pari materia*. These two enactments are within almost two months of each other, both having been enacted by the same Congress at the same session.

The Court's attention is invited to the fact that the Revenue Act of 1928 (H. R. No. 1), was introduced in the House on December 5, 1927, and referred to the Ways and Means Committee (Cong. Rec., Vol. 69, Part 1, 70th Cong., 1st Sess., p. 18), and was reported back to the House (H. Rep. No. 2), on December 7, 1927, without amendment (*id.*, p. 225). The bill passed the House on December 15, 1927 (*id.*, p. 718). It was referred to the Senate Finance Committee on December 17, 1927 (*id.*, p. 789), and was reported back to the Senate by the Finance Committee (S.

Rep. 960) on May 1, 1928 (Cong. Rec., Vol. 69, Part 7, 70th Cong., 1st Sess., p. 7501).

It, therefore, appears that the Senate Finance Committee had under consideration the Revenue Act of 1928, which contained Section 614, at the very time it produced Section 24 (e) of the Trading with the Enemy Act. Since these two bills were before the same Committee of the Senate at the same session, the presumption is that they are imbued by the same spirit and actuated by the same policy, and that Section 614 of the Revenue Act of 1928, was not intended to, and it did not either expressly or impliedly, repeal Section 24 (e). The two enactments are unrelated; they deal with entirely different subject matters and with entirely different classes of persons and property.

Lewis' Sutherland on Statutory Construction, 2d. Ed., Vol. I, Sec. 268, p. 513, says:

Acts passed at same session—Provisions in same act.—The presumption is stronger against implied repeals where provisions supposed to conflict are in the same act or were passed at nearly the same time. In the first case it would manifestly be an inadvertence, for it is not supposable that the legislature would deliberately pass an act with conflicting intentions; in the other case the presumption rests on the improbability of a change of intention, or, if such change had occurred, that the legislature would express it in a different act without an express repeal of the first. (*Eckloff v. Dist. of Columbia*, 4 Mackay, 572; *Beals v. Hale*, 4 How. 37.) “*Statutes enacted at the same*

session of the legislature should receive a construction, if possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in pari materia. Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session." (*White v. Meadville*, 177 Pa. St. 643, 35 Atl. 695, 34 L. R. A. 567.) The presumption is that different acts passed at the same session of the legislature are imbued by the same spirit and actuated by the same policy, and that one was not intended to repeal or destroy another, unless so expressed. (*Banks v. Yolo County*, 104 Cal. 258, 37 Pac. 900; *Hutchinson v. Self*, 153 Ill. 542, 39 N. E. 27.) Where two acts are passed or go into effect on the same day it is strong evidence that they were intended to stand together. (*Commonwealth v. Huntley*, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.) So where the later law was the first to be introduced. (*Lien v. County Com'rs*, 80 Minn. 58, 82 N. W. 1094.) (Italics ours.)

Lewis' Sutherland on Statutory Construction, 2d Ed., Vol. I, Secs. 274, 275, pp. 526-531, in stating that general laws will not impliedly repeal those which are special or local, says:

It is a principle that a general statute without negative words will not repeal by implication from their repugnancy the provisions of a former one which is special, local, or particular, or

which is limited in its application, unless there is something in the general law or in the course of legislation upon its subject-matter that makes it manifest that the legislature contemplated and intended a repeal. (*United States v. Sampson*, 19 App. Cas. (D. C.) 419.) “It is the established rule of construction that the law does not favor a repeal by implication, but that where there are two or more provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions. A special statute providing for a particular place, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly and but for the special law, include the case or cases provided for by it.” (*People v. Pacific Imp. Co.*, 130 Cal. 442, 445, 446, 62 Pac. 739.) * * *

When the legislator frames a statute in general terms or treats a subject in a general manner, it is not reasonable to suppose that he intends to abrogate particular legislation to the details of which he had previously given his attention, applicable only to a part of the

same subject, unless the general act shows a plain intention to do so. (*Ex parte Crow Dog*, 109 U. S. 556.) * * *

The general law can have full effect beyond the scope of the special law, and, by allowing the latter to operate according to its special aim, the two acts can stand together. Unless there is plain indication of an intent that the general act shall repeal the other, it will continue to have effect, and the general words with which it conflicts will be restrained and modified accordingly. Where there are in one act or several contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same acts. (*Italics ours.*)

The general rule of statutory construction appears to be that one statute is not repugnant to another unless they relate to the same subject matter and are enacted for the same purpose. It is not enough that there is a discrepancy between different parts of a system of legislation on the same general subject. There must be a conflict between different acts on the same specific subject. When there is a difference in the whole purview of the two statutes apparently relating to the same subject, the former is not repealed. *United States v. Claflin*, 97 U. S. 546.

In *Ex parte Crow Dog*, 109 U. S. 556, 570–571, the Supreme Court after expressly holding that “*Implied repeals are not favored*” approved of the English rule as follows:

“The general principle to be applied,” said Bovill, C. J., in *Thorpe v. Adams*, L. R. 6 C. P.

135, "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in *Fitzgerald v. Champenys*, 30 L. J. N. S. Eq. 782; 2 Johns. and Hem. 31-54, "that the legislature having had its attention directed to a special subject, and having observed all of the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

When Congress enacted the Settlement of War Claims Act, which added Section 24 (e) to the Trading with the Enemy Act, it had its attention directed to a special subject, viz., the settlement of "*claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian,*" and it observed all the circumstances of the case and provided for them by its final disposition thereof in the Settlement of War Claims Act. Consequently, Congress, under the rule of statutory construction laid down in *Ex Parte Crow Dog*, *supra*, did not intend by the Revenue Act of 1928, a general enactment, which contained no reference to the previously enacted Settlement of War Claims Act, to

derogate from or repeal any of the provisions contained in said special statute.

In *Rodgers v. United States*, 185 U. S. 83, 87-89, the Supreme Court said:

It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. * * *

In Black on Interpretation of Laws, 116, the proposition is thus stated:

“As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all.”

So, in *Sedgwick on the Construction of Statutory and Constitutional Law*, the author observes, on page 98, with respect to this rule:

“The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.”

And in *Crane v. Reeder*, 22 Michigan, 322, 334, Mr. Justice Christiancy, speaking for the Supreme Court of that State, said:

“Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict.”

In *Washington v. Miller*, 235 U. S. 422, 428, the Supreme Court said:

* * * where there are two statutes upon the same subject, the earlier being special and

the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (*Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, Id., 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87-89).

In *Simon v. Simon*, 58 App. D. C. 158, 160, 26 F. (2d) 530, 532, this Court had before it the question of whether or not the special provisions of Section 97 of the District of Columbia Code had been repealed by the general terms of Section 100 of said Code, enacted at a later date. This Court held the special provisions of Section 97 were not repealed by the general provisions of Section 100, saying:

Words expressive of a particular intent, incompatible with others expressive of a general intent, may be construed as an exception to the latter, so that all may have effect. *Dwarris on Statutes and Constitutions* (Potter, 1871) 273; *Churchill v. Crease*, 5 Bing. 177, 180; *State v. Moore*, 108 Md. 636, 71 A. 461, 462.

It is a canon of statutory construction that, where there is an earlier special statute and a later general statute, the terms of the later being broad enough to include the matter provided for in the former, the special statute must be considered as an exception to the general statute. *Ex parte Crow Dog*, 109 U. S. 556, 570, 3 S. Ct. 396, 27 L. Ed. 1030; *Rodgers v. United States*, 185 U. S. 83 87, 88, 89, 22 S. Ct. 582, 46 L. Ed. 816.

Section 97 of the Code is in full force, and whether its provisions be wise or unwise, they must be respected and given effect by the court until such time as they are modified, amended, or repealed by Congress.

It is unnecessary to go into a detailed discussion of the numerous cases cited by the relator, but it suffices to say that the leading authorities cited by the relator merely support the proposition that a general statute will repeal a prior general statute relating to the same subject. That, as hereinbefore shown, is not the situation in this case. The relator is endeavoring to persuade this Court to hold that the general Revenue Act of 1928 repealed a special provision of the Trading with the Enemy Act, enacted only a few weeks before at the same session of Congress, without showing any manifest intention of Congress to so repeal. An examination of the two main cases relied upon by the relator shows that they do not support the relator's position. In *United States v. Yuginovich*, 256 U. S. 450, cited by the relator, the Court had before it the question of whether Section 3257 of the Revised Statutes was superseded by Section 35, Title II of the National Prohibition Act. The Supreme Court held that Section 3257 of the Revised Statutes which made it an offense for a distiller to defraud, or attempt to defraud, the United States of a tax on the spirits distilled by him, and penalized the offense by forfeiture of the distillery, etc., and heavy fine and imprisonment, was superseded as respects persons

manufacturing spirits for beverage purposes by Section 35, Title II of the National Prohibition Act, which imposed lesser penalties for the same acts. The Court said (pp. 461-463):

Section 35 in its first sentence repeals all prior acts to the extent of their inconsistency with the National Prohibition Act, * * *

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tynen*, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty.

The relator cites *Callahan v. United States*, 285 U. S. 515, and says that it so thoroughly supports its position that its "case might well be rested" on that case. In that case the petitioner was indicted under Section 593 (b) of the Tariff Act for aiding and abetting the importation of intoxicating liquors contrary to law, the specified illegality being the provisions of the National Prohibition Act which forbade such importations. The petitioner demurred to the indictment asserting that it set forth an offense under the Prohibition Act and not under the Tariff Act. The demurrer was overruled and conviction followed. The Supreme Court affirmed the judgment of conviction, saying (p. 517):

We are asked to hold that one who violates the prohibition act by importing liquor, may

not be indicted, tried and sentenced under the tariff act, which makes the importation of "any merchandise contrary to law" a criminal offense. The phrase 'contrary to law' as used in the later act is unqualified and taken in its natural meaning signifies "contrary to any law," and hence contrary to the earlier prohibition act, so that a violation of that act would be an offense within the other.

The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the tariff act is concerned with a wholly separate subject and the penal section 593 (b) aimed at unlawful importation should not be construed as repealing the earlier special statute. (*Ex parte Crow Dog*, 109 U. S. 556, 570; *Rodgers v. United States*, 185 U. S. 83, 87-89; *Washington v. Miller*, 235 U. S. 422, 428.) This argument overlooks the fact that the National Prohibition Act prescribes no special penalty for importation in violation of its provisions. Section 29 of Title II, an omnibus section fixing penalties for violations for which no special penalty is prescribed, is the only one under which punishment could be imposed for illegal importation. The language used is sufficiently broad to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The tariff act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior

statute embracing the same subject. *Cook County National Bank v. United States*, 107 U. S. 445; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 22. The indictment charged an offense under the Tariff Act and the judgment must be affirmed.

It will thus be seen that the Tariff Act merely fixed a definite penalty for the importation of intoxicating liquors which the previously enacted National Prohibition Act prescribed no special penalty, and as stated by the Supreme Court "In this respect it superseded the general provisions of the prior statute (i. e., National Prohibition Act) embracing the *same subject*," viz., "importation of 'any merchandise contrary to law.' "

The relator in its brief (p. 13) cites the case of *U. S. ex rel. Escher v. Burnet et al.* (At Law No. 78923), decided by Mr. Justice Stafford of the Supreme Court of the District of Columbia on March 5, 1931, and argues that the present case "is precisely like" that case. In that case the Alien Property Custodian had wrongfully and unlawfully seized the property of three Swiss citizens which property was not subject to seizure under the law, and had paid a tax imposed thereon by the Bureau of Internal Revenue. The tax was refunded, but the Commissioner of Internal Revenue declined to pay interest upon such refund. The Swiss citizens in question filed a petition for writ of mandamus against the Commissioner of Internal Revenue asking the Court to issue a writ of mandamus compelling the Commis-

sioner to compute, authorize, allow, and pay to the Alien Property Custodian interest on said refunded taxes and to direct the Custodian to pay such interest when received from the Commissioner to said Swiss citizens. Mr. Justice Stafford, after a hearing, granted the writ of mandamus prayed for, and rendered the following memorandum opinion:

Upon the best consideration I have been able to give this case I think the petitioners are right in their contention that the general statute allowing interest applies and that Clause "E" of Section 24 of the Settlement of War Claims Act does not apply to property of friendly aliens which has been improperly seized.

I think, however, the Comptroller is right in his contention that mandamus can not be maintained against him in advance of any presentation of the claim to him.

Counsel will please confer and agree upon the proper entries.

This Court's attention is invited to the fact that Mr. Justice Stafford, who decided that case, did not hold, as the relator here urges, that Section 614 of the Revenue Act of 1928 repealed Section 24 (e) of the Trading with the Enemy Act, but to the contrary held "that the general statute allowing interest applies and that Clause 'E' of Section 24 * * * does not apply to property of friendly aliens which has been improperly seized." In other words, Mr. Justice Stafford's decision is that a nonenemy whose property has been erroneously and illegally seized is

in the same position with respect to the collection of interest upon a tax refund as though his property had never been taken over by the Alien Property Custodian. It is thus seen that that case is not analogous to the instant case as it related to the property of neutrals which was wrongfully seized during the war and involved an entirely different question of law.

III

Section 24 (e) of the Trading with the Enemy Act applies to Internal Revenue taxes paid by the Alien Property Custodian both before and after its enactment

On page 33 of its brief the relator says that "Section 24 (e) has application only to the special condition resulting from the imposition of new taxes * * * payable for the first time beginning 1928." And on the same page of its brief the relator says that "Section 24 (e) consequently related wholly to taxes * * * which were payable *in the future*."

Upon this hypothesis the relator then argues that since the taxes here in question were paid on March 15, 1924, before the enactment of Section 24 (e) on March 10, 1928, the provisions of Section 24 (e) denying interest upon *any internal revenue taxes* refunded to the Alien Property Custodian do not apply to this case. This argument of the relator is erroneous because it is based upon a false premise.

The respondents respectfully invite the Court's attention to the Act of July 1, 1918, 40 Stat. 645, which provides that "All taxes heretofore or hereafter lawfully assessed by any body politic against

money or other property held by the Alien Property Custodian shall be paid out of such money or other property, * * *” and section 24 of the Trading with the Enemy Act, enacted on March 4, 1923, c. 285, 42 Stat. 1516, which provides that “The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, * * *.”

Both of these Statutes were in full force and effect at the time of the payment of the tax here in question. Section 24 was not repealed by the Settlement of War Claims Act of March 10, 1928 (c. 167, 45 Stat. 254), for Section 18 thereof, which enacted Section 24 (e) of the Trading with the Enemy Act, provided as follows:

Section 24 of the Trading with the Enemy Act, as amended, is amended by inserting “(a)” after the section number and by adding at the end of such section new subsections to read as follows (i. e., subsections b, c, d, e, and f).

Section 24 (e) of the Trading with the Enemy Act was inserted by the Committee on Finance of the United States Senate in Section 18 of the Settlement of War Claims Act (being H. R. No. 7201). The Settlement of War Claims Bill which included Section 24 (e) as finally enacted was reported to the Senate by the Committee on Finance on February

9, 1928. Senate Rep. No. 273, 70th Cong., 1st Sess. The portion of the report relating to taxation reads as follows:

Section 18 of the bill amends section 24 of the Trading with the enemy act, by adding thereto several new subsections, covering Federal taxation in the case of persons whose property has been seized by the Alien Property Custodian. The provisions of the House bill provide merely that the amount of the taxes shall be computed in the same manner as though the money or other property had not been seized by or paid to the Alien Property Custodian. The committee amendment goes much further than this, and attempts to provide equitable rules for the determination of the various tax liabilities.

Your committee believes that any gain resulting from the sale of assets by the Alien Property Custodian (whether owned by an individual or a corporation at the time of seizure) should be subject only to a 12½ per cent tax, because of the fact that the sale very likely would not have been made had the property been retained by the owner and, accordingly, the high tax rates of the war years would not have been applicable. For convenience, the provisions of section 208 of the Revenue Act of 1926 are adopted by reference and made applicable to all taxpayers involved. The committee amendment also makes certain that the involuntary conversion provisions of the various revenue laws and regulations will be applicable. *Inasmuch as the owner of the*

property was unable to take any action in respect of the payment of taxes, it is also provided that the provisions of the various laws relating to interest and civil penalties (the provisions usually referred to in the revenue laws as interest, penalties, additions to the tax, or additional amounts) will not be collected. Inasmuch as the owner of the property had no opportunity to know how much taxes were paid by the Alien Property Custodian and in many cases no opportunity to file a claim, within the statutory period, for a refund of any excessive amounts paid, it is provided that claims may be filed, within six months after the bill becomes law, with the same effect as though filed within the statutory period applicable thereto. It will be noted that full power to prescribe regulations for the application of the provisions is given to the Secretary of the Treasury in order to prevent prolonged litigation. (Italics ours.)

The above-quoted report of the Senate Committee on Finance shows on its face that it was the intention of that Committee that Section 24 (e) should relate to internal revenue taxes paid both before and subsequent to the enactment of the bill. This is clearly shown by the language of the report wherein the committee refers to the fact that “the owner of the property *was* unable to take any action in respect of the payment of taxes”, and further stated that “Inasmuch as the owner of the property *had no opportunity* to know how much taxes *were paid by the Alien Property Custodian* and in many cases no opportunity to file a claim, within the statutory period, for a refund

of any excessive amounts paid.” The language used in the committee’s report indicates quite clearly that the committee had carefully considered the question of whether or not the statute of limitations had run against the filing of a claim for a refund upon previously paid taxes, and also the fact that the owner had not had an opportunity to know how much taxes were paid. In other words, the main provisions of Section 24 (e) were inserted to take care of instances where the tax had already been paid by the Custodian.

In the report of the Conference Committee to the House of Representatives on February 27, 1928 (reported by Mr. Greene of Iowa, Chairman of the Ways and Means Committee of the House, which produced the Settlement of War Claims Bill), it is stated that (House Rep. No. 766, 70th Cong., 1st Sess.):

The House bill provided that the Federal taxes on alien property should be computed in the same manner as if the property had not been seized and should be paid wherever possible out of the funds held by the Alien Property Custodian. *The Senate amendment added* four qualifications: First, that, in the case of the disposition of capital assets, the rate should not exceed 12½ per cent; second, that the provisions of the laws and regulations relating to involuntary conversion should be applicable; third, *that no interest or penalties should be payable by the taxpayer and no interest on refunds should be payable by the Government.* (Italics ours.)

In *Caminetti v. United States*, 242 U. S. 470, 490, the Supreme Court said:

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation..

In *Duplex Co. v. Deering*, 254 U. S. 443, 474, the Court said:

By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the lawmaking body. * * * *But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. (Italics ours.)*

On February 16, 1928 (Cong. Rec., Vol. 69, Part 3, 70th Cong., 1st Sess., p. 3101), Senator Smoot, Chairman of the Senate Finance Committee, who had charge of the Settlement of War Claims Bill when that bill was before the Senate, said:

The provisions relating to taxation are fully discussed in the committee report, and it is not necessary for me to go into them at this

time, beyond saying the committee tried to work out provisions which were fair to the owner as well as to the United States.

Senator Smoot was the Chairman of the Managers on the part of the Senate of the Conference Committee of the Senate and House which had the Settlement of War Claims Bill under consideration after its approval by the Senate, and on February 28, 1928, he addressed the Senate upon the conference report, and with respect to the provisions of the Settlement of War Claims Act relating to taxation, including Section 24 (e), he said (Cong. Rec., Vol. 69, Part 4, 70th Cong., 1st Sess., pp. 3685, 3686):

The House bill provided that the Federal taxes should be computed in the same manner as though the property had not been seized by the Alien Property Custodian, and should be paid wherever possible out of the funds held by the Alien Property Custodian. *The Senate added* five qualifications: First, that, in the case of the disposition of capital assets, the rate should not exceed 12½ per cent; second, that the provisions of the regulations and laws relating to involuntary conversion should be applicable; third, *that no interest or penalties should be payable by the taxpayer and that no interest on refunds should be payable by the Government*; fourth, *that claims for refund could be filed within six months after the bill becomes law, notwithstanding the expiration of the ordinary statutory period*, and according to the Government the corresponding right to assess within six months; and fifth, that tentative

returns could be filed and tentative assessments made, and that the 20 per cent of the property withheld should be retained by the Alien Property Custodian as security for the payment of any deficiency finally determined to be due. The first provision was accepted by the House with an amendment making the maximum rate 30 per cent and also making it certain that it applies to partnerships, associations, and corporations as well as to individuals. The second and third provisions were accepted without change. The fourth provision was amended so as to permit the filing of claims for refund solely for the purpose of obtaining the benefit of the provisions just referred to. A substitute for the fifth provision was agreed to, permitting the return, prior to a final determination of tax liability, under Treasury regulations which will protect the interests of the Government. For example, a partial return could be authorized if the remainder (not including the 20 per cent) would be sufficient to meet the probable tax liability, or if a bond were given in an amount sufficient to cover the probable tax liability. (Italics ours.)

IV

The Treaty between the United States and Germany proclaimed on October 14, 1925, does not vest in the relator the right to the interest here sought to be recovered

The relator contends that the "Treaty between the United States and Germany of friendship, commerce, and consular rights," proclaimed October 14, 1925, 44 Stat. 2132, "vested in the petitioner the right to

the interest here sought to be recovered.” (R. 16.) This contention is clearly erroneous as will readily be seen.

Article I of that Treaty provides that—

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.

This Article obviously has no application to the case at bar, for the reason that it would only apply in any event to a German national *within the territory of the United States*, whereas the petition alleged that the relator is a German corporation “with its office and principal place of business located at Frankfurt A/M, Germany” (R. 2), and there is no allegation that it is even doing business in the United States.

The only other provision of said Treaty relating to taxes is Article VIII, which provides that—

The nationals and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities and the amount of drawbacks and bounties.

As above shown the relator is not a German national within the territory of the United States. The tax here in question was paid on March 15, 1924.

At that time as well as on October 14, 1925, when this Treaty became effective, the relator had no title to or right in its seized property from which the tax was paid. Unquestionably at the time the tax was paid as well as at the time the treaty became effective, the legal title to the relator's seized property was vested in the Alien Property Custodian as a trustee for the United States in the public interest. *United States v. Chemical Foundation*, 272 U. S. 1; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F. (2d) 742; *Hicks v. Anchor Packing Co.*, 16 F. (2d) 723; *Garvan v. Marconi Wireless Telegraph Co.*, 275 Fed. 486; *Kohn v. Kohn*, 264 Fed. 253; *Junkers v. Chemical Foundation*, 287 Fed. 597. The relator's seized property, therefore, clearly was not merchandise of a German national within the territory of the United States within the meaning of said Treaty.

There is nothing in the Treaty which in the remotest way tends to indicate that it was intended to apply in any respect to the seized property of German nationals. Furthermore, the Trading with the Enemy Act, as amended from time to time shows the specific intent of Congress that the seized German property should be disposed of only by Congress as provided in said Trading with the Enemy Act, and the amendments thereto by Congress.

The relator contends that "If the Treaty be deemed impliedly repealed by section 24 (e), then for the same reason section 614 of the Revenue Act of 1928 impliedly repealed section 24 (e)." (R. 16.) This

contention of the relator is a *non sequitur* for the reasons, as hereinbefore shown, that the Treaty of friendship, commerce, and consular rights between the United States and Germany of October 14, 1925, does not in fact, or even purport, to affect property seized by the Alien Property Custodian, and, secondly, the tax in question was paid in 1924 from property held by the Custodian the title to which was vested in the Custodian as a trustee for the United States in the public interest, and, therefore, was not paid from the property of a German national within the United States or from merchandise within the United States belonging to a German national.

V

Section 24 (e) of the Trading with the Enemy Act is constitutional

The relator stated in its demurrer that if Section 24 (e) is construed so as to deprive the relator of interest on the refunded taxes in question, it is null and void and violative of the Fifth Amendment to the Constitution of the United States. This contention is entirely erroneous.

The relator's property concededly was enemy owned at the time of the seizure thereof, and the demurrer concedes that it was rightfully seized by the Alien Property Custodian. Upon the seizure every right, title, and interest of the enemy owner became completely divested. After the seizure Congress could dispose of the property as it should see fit.

In *United States v. Chemical Foundation*, 272 U. S. 1, 11, the Supreme Court said:

Congress was untrammelled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners. There is no constitutional prohibition against confiscation of enemy properties. * * * And the Act makes no provision for compensation. * * * The provision that, after the war, enemy claims shall be settled as Congress shall direct conferred no rights upon such owners. Moreover, the Treaty of Berlin prevents the enforcement of any claim by Germany or its nationals against the United States or its nationals on account of the seizures and sales in question.

Unquestionably Congress could have confiscated the relator's seized property if it had wanted to do so. As stated by the Supreme Court in *White v. Mechanics Securities Corporation*, 269 U. S. 283, 301:

The United States seized the property in question from an enemy and of course could do with it what it liked.

That being true, then how can there be any violation of any constitutional right in denying interest on refunded taxes which were paid from the relator's seized property? Any return of principal or interest is merely an act of grace on the part of Congress. Therefore, Congress was undoubtedly acting fully within its constitutional authority when, in enacting the Settlement of War Claims Act providing for the

general return of enemy property, it placed the specific limitation therein (Sec. 24 (e)) that *no interest shall be "credited or paid to the taxpayer" on refunded taxes.*

The Trading with the Enemy Act, whether taken as originally enacted, or as since amended is strictly a war measure and was enacted pursuant to the war powers of Congress. *Stoehr v. Wallace*, 255 U. S. 239, 241-242. And in *Klein v. Palmer et al.*, 18 F. (2d) 932, the United States Circuit Court of Appeals for the 2nd Circuit in referring to the war powers of Congress with respect to enemy property said:

And those powers, in the language of *Miller v. U. S.*, 11 Wall. 268, 303, 20 L. Ed. 135, "are not affected by the restrictions imposed by the Fifth and Sixth Amendments."

In *Orenstein & Koppel Aktiengesellschaft v. Koppel Industrial Car & Equipment Co.*, 59 App. D. C. 221, 223, 38 F. (2d) 532, 534, where the constitutionality of a certain provision of the Settlement of War Claims Act, enacted at the same time Section 24 (e) was enacted, was questioned, this Court said:

Counsel for defendant attack the provisions of section 30, supra, as unconstitutional and void. This contention can be disposed of briefly in view of the power vested in the government to seize alien property in time of war. That this is alien property is not contested. Disposing of a similar contention, Mr. Justice Holmes, in *White v. Mechanics' Securities Corporation*, 269 U. S. 283, 300, said: "The funds were seized adversely by the United

*States in time of war. They are in its hands; it has declared by an Act of Congress what shall be done with them, and that is the end of the matter. There is no question that such a seizure and disposition are within its powers. * * ** The United States seized the property in question from an enemy and of course could do with it what it liked."

This holding is supported in *United States v. Chemical Foundation*, 272 U. S. 1; *Swiss National Insurance Co. v. Miller*, 267 U. S. 42. The unlimited power of the government to provide for the disposition of alien property funds is also specifically ratified by the treaty of Berlin, Sec. 297, subsec. (d), and Annex to section 4, subsecs. 1 and 3. (Italics ours.)

In *Sprunt et al. v. Direction der Disconto Gesellschaft*, Case No. 5579, decided January 3, 1933, this Court in discussing the question of the disposition of the seized property of German citizens, said:

It is certainly within the power of Congress to determine how the money or property in the hands of the Alien Property Custodian shall be disposed of * * *.

VI

Mandamus is not the proper remedy in this case

The relator in its petition not only prayed for a writ of mandamus directing the Commissioner of Internal Revenue, but also the Secretary of the Treasury and the Treasurer of the United States, to compute and allow interest on said refunded taxes

and to authorize and direct the proper disbursing officer to pay the same to the Alien Property Custodian for the account of the relator. (R. 6.) As hereinbefore stated, the crediting or payment of interest on said refunded taxes is barred by Section 24 (e) of the Trading with the Enemy Act.

The statutes do not vest in the Secretary of the Treasury or the Treasurer of the United States authority to compute and allow interest upon tax refunds or to authorize and direct the payment thereof. The respondents in their answer said that there is no duty on the part of the Secretary of the Treasury, the Treasurer of the United States, and the Alien Property Custodian in connection with the computation, allowance, authorization, and direction for payment of interest on said refunded taxes. (R. 12.) This allegation of fact was conceded by the demurrer. Consequently, since there is no duty on the part of the Secretary of the Treasury, the Treasurer of the United States, or the Alien Property Custodian with respect to the computation, allowance, authorization, or direction for payment of interest on refunded taxes, it follows that the writ of mandamus will not lie against them. Therefore, the next question then is whether or not a writ of mandamus may be issued in this case to the Commissioner of Internal Revenue.

The relator cites *Blair v. Birkenstock*, 55 App. D. C. 376, 6 F. (2d) 679, as supporting the general proposition that where the Commissioner of Internal Revenue has failed to pay interest upon refunded taxes, the Supreme Court of the District of Columbia

may issue a writ of mandamus to compel the Commissioner to pay such interest. In that case the facts were not in dispute. There was an overpayment of taxes by the taxpayer and the amount of such overpayment was duly refunded to the taxpayer by the Commissioner, together with interest in the sum of \$1,057.41. The interest was computed under the terms of the Revenue Act of 1921. The taxpayer contended that the interest should have been computed under the Revenue Act of 1924, which granted a higher rate of interest. The taxpayer, having failed to obtain the amount of interest allowed by the Revenue Act of 1924, applied to the court below for a writ of mandamus to compel the Commissioner to pay him the balance of interest due him under the law. This Court said (p. 378):

The record discloses that no finding or order respecting the payment of interest upon the refund was made, or could have been made, by the Commissioner until June 30, 1924, at which time the collector at Philadelphia reported the result of his examination. But before that time Congress repealed section 1324 (a) of the Revenue Act of 1921; consequently the Commissioner was no longer authorized to proceed under it. After the repeal, his sole authority to order the disbursing clerk to pay interest upon such refunds was derived from section 1019 of the Revenue Act of 1924. Consequently the provisions of that section were controlling, and the interest upon this refund should have been computed accordingly.

It is thus seen that in the above case the Commissioner of Internal Revenue had recognized the right of the petitioner to interest upon his refunded taxes, but had failed to pay the full amount of interest due under the law. There was, therefore, no question of the exercise of discretion, but there was merely a ministerial duty on the part of the Commissioner to pay to the taxpayer the balance of the interest clearly due under the Revenue Act of 1924, which was then in full force and effect. Mandamus there was issued to compel the Commissioner to perform in its entirety a duty which he had already recognized by having performed in part. In the above case there was only one statute relating to interest. In the instant case there are two statutes relating to interest, one of which completely bars the payment of interest, and another which the relator contends allows interest. In order for the Commissioner to have allowed interest in the present case it would have been necessary for him to have acted in a quasi-judicial capacity in that he would have had to exercise judgment and discretion in the interpretation of allegedly conflicting statutes. The instant case is, therefore, clearly distinguishable from *Blair v. Birkenstock*.

Mr. Justice Peckham, speaking for the court in the case of *Roberts v. United States*, 176 U. S. 221, on certiorari to this Court, in discussion whether or not mandamus was the proper remedy in a case similar to the case at bar, said (pp. 229-230):

The law relating to mandamus against a public officer is well settled in the abstract,

the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in *United States v. Black*, 128 U. S. 40, and upon the authority of that case the defendant claims that no mandamus can be issued against him.

The writ was refused in the *Black case*, because, as the court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction and the effect which the latter acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus.

In the case at bar there are several complicated statutes to be examined and difficult determinations to be made by the officers charged with the refunding of taxes and the payment of interest thereon. This is not a case where there is a single, plain, unambiguous statute directing a ministerial act to be performed by the respondents. The respondents in the case at bar

are called upon to read, construe, and determine several statutes, and in so doing to make reference to the hearings before and reports of Congressional committees, in order to determine the purpose and intent of Congress in enacting these statutes, and under the decisions of the Supreme Court of the United States mandamus cannot be invoked to review acts which are quasi-judicial in character.

Mr. Justice Peckham, in *Roberts v. United States*, *supra*, further said (p. 230):

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within that meaning of that act. * * *

This case comes within the exception stated in the *Black case*, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of the Government in the exercise of their ordinary official duties, even when those duties require an interpretation of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

We submit that the law is specific and plain that where an executive officer is called upon to construe conflicting statutes and to determine the intent and purpose of Congress in enacting such statutes and in passing upon the question of whether one statute is repealed by another or whether certain specific parts of an earlier statute are repealed by implication by a later statute, he is not performing a purely ministerial duty. He is performing an act quasi-judicial in character, and being of a quasi-judicial character, which involves the exercise of judgment and discretion, mandamus can not be invoked to review that decision. It would not be disputed that, if a judgment was procured against the United States directing the Treasurer to pay interest on that judgment at a certain per cent under and by virtue of the provisions of a specific statute and the Treasurer refused to comply with the mandate as to interest, mandamus would lie. That is not the case here, and it is respectfully submitted that the courts have distinguished the cases where a writ of mandamus may be issued directing the payment of interest, and where mandamus may not be invoked to review determinations of executive officers declining the payment of interest, and that this case falls within the category of cases holding that mandamus is not the proper remedy and may not be invoked.

CONCLUSION

It is respectfully submitted that the judgment of the court below was correct, and it should be affirmed.

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The second Executive Order issued after the enactment of the Act of July 1, 1918 (40 Stat. 645), and the first Executive Order after the enactment of said statute of major significance was the -

EXECUTIVE ORDER of the President (No. 2916) of July 16, 1918, which provides as follows:

"1. The Alien Property Custodian shall have the power and authority to do any and all things reasonable and proper in or about the custody, management, administration, protection, preservation and control of any such property according to the nature and character of the property and the attendant circumstances, including (but without limiting the generality of the foregoing) the power and authority * * * ; to determine and pay all reasonable and proper expenses incurred in or about or with respect of the exercise of any of the powers and authority vested in the Alien Property Custodian or any depository for him, including expenses that may be incurred in or about securing possession, custody or control of any such property, and including also taxes and other charges heretofore or hereafter lawfully assessed upon or against such property by any body politic; provided that this shall not be construed to require the payment of any stamp or other taxes upon or on account of conveyance, transfer, assignment or delivery of property to the Alien Property Custodian or to any agent, attorney, bailee, nominee or depository for him; and provided further that this shall not in any way affect the power of the Commissioner of Internal Revenue or any regulations made by him or under his authority."

EXECUTIVE ORDER of the President (No. 2991) of November 12, 1918, contains precisely the same statement word for word as above quoted from the Executive Order of July 16, 1918.